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No. 93-1571

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

ELIZABETH QUTB, INDIVIDUALLY AND AS NEXT FRIEND OF SABRINA QUTB, et al.,

Petitioners

v.

STEVE BARTLETT, MAYOR OF THE CITY OF DALLAS, TEXAS, et al.,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Dallas juvenile curfew ordinance improperly delegate legislative and judicial power to, and vest untoward discretion in, enforcement authorities so as to operate as an unconstitutional prior restraint on first amendment rights to freedom of speech, contravening the First Amendment to the United States Constitution as expounded in *Forsyth County, Georgia, v. Nationalist Movement*, ___ U.S. ___, 112 S.Ct. 2395, 2401 (1992), and *City of Houston, Texas v. Hill*, 482 U.S. 469, 466-67 (1987)?

2. Does the Dallas juvenile curfew ordinance so shift the burden of proving the non-existence of a free speech right and offer such untimely redress for inevitable restrictions of free speech rights that it unconstitutionally chills those rights and operates as a prior restraint in violation of the First Amendment to the United States Constitution as expounded in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), *Elrod v. Burns*, 427 U.S. 347 (1975), and *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965)?

3. Is the Dallas juvenile curfew ordinance narrowly tailored and the least restrictive means to advance concededly compelling governmental interests so as to satisfy the strict scrutiny demanded of a law that implicates fundamental rights in an equal protection challenge?

PARTIES

The participants in the proceedings below were:

Plaintiffs, Elizabeth Qutb, Sabrina Qutb, James Poe, Alan Poe, E. L., P. L., M. B., C. B., as representatives of a class of persons under the age of seventeen and of parents of persons under the age of seventeen.

Defendants, Steve Bartlett, Al Libscomb, Chris Luna, Domingo Garcia, Charles Tardy, Larry Duncan, Donald Hicks, Mattie Lee Nash, Charlotte Mayes, Glenn Box, Donna Halstead, Paul Fielding, Max Wells, Jerry Bartos and Lori Palmer in their capacity as City Council Members of Dallas, Texas; Jan Hart in her capacity as City Manager of Dallas Texas; William T. Rathburn in his capacity as Police Chief of the City of Dallas, Texas.

Elaine Hengen-Piper, attorney for the City of El Paso, Texas, and Richard Henderson attorney for the city of Fort Worth as Amicus Curarae

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	ii
PARTIES	iii
TABLE OF AUTHORITIES	vi-x
OPINIONS BELOW	2
ORDINANCE INVOLVED	2
STATEMENT OF THE CASE	2
The Proceedings Below	2
1. The District Court's Decision	2
2. The City's Basis For Appeal	3
3. The Fifth Circuit's Opinion	4
4. Motion For Rehearing	4
STATEMENT OF FACTS	5
REASONS FOR GRANTING THE WRIT	6
1. The Fifth Circuit's decision conflicts with decisions of state courts of last resort.	6
2. The Fifth Circuit's decision conflicts with decisions of other state courts and federal district courts.	9

3. The Fifth Circuit's decision implicates important issues of federal constitutional law that the Court has not settled but should definitively resolve. 16

Untimely Redress 17

Improper Delegation 18

Shifting the Burden 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Allen v. City of Bordentown,
216 N.J.Super. 557 A.2d 478 (1987) 15

Aptheker v. Secretary of State,
378 US 500 (1964) 10

Bellotti v. Baird,
443 US 662 (1979) 3, 4, 14,17

Bethel School Dist. No.403 v. Fraser,
478 US 675 (1986) 7

Brinegan v. United States,
338 US 160 (1949) 8

Brown v. Ashton,
93 Md.App. 25, 611 A.2d 599 (1992) 15

Bykofsky v. Borough of Middletown,
401 F.Supp. 1242 (M.D.Pa. 1975) 14,15,16

Chase v. Twist,
323 F.Supp. 749 (E.D.Ark. 1970) 16

City of Eastlake v. Ruggiero,
220 NE 2d 126 (1966) 15

City of Houston, Texas v. Hill,
482 US 469, 107 S.Ct. 2502 (1987) 18,19

City of Maquoketa v. Russell,
484 NW 2d 179 (Iowa 1992) 6

City of Milwaukee v. K.F.,
145 Wis.2d 329, 426 NW 2d 329 (1988) 8,9

City of Seattle v. Pullman,
82 Wash.2d 794,514 P.2d 1059 (1973) 7

City of Wadsworth v. Owens,
42 Ohio Misc.2d 1, 536 NE 2d 67 (Ohio Mun. Ct. 1987) 15

Coates v. City of Cincinnati,
402 U.S. 611 (1971) 15

Davis v. Justice Court of Pittsburgh Judicial District,
10 Cal.App.3d 1002, 89 Cal.Rptr. 409 (1970) 16

Elrod v. Burns,
110 S.Ct. 2926 (1990) 18

Ervin v. State,
14 Wis.2d 194, 163 N.W. 2d 207 (1968) 6

Forsyth County, Ga v. Nationalist Movement,
112 S.Ct. 2395 (1992) 19

F.W./P.B.S., Inc. v. City of Dallas,
110 S.Ct. 596 (1990) 19

Glover v. District of Columbia,
250 A.2d 556 (1969) 16

Hagan v. CIO,
307 U.S. 496 (1939) 15

Hayes v. Municipal Court of Oklahoma,
487 P.2d 974 (1977) 7

Hodgson v. Minnesota,
110 S.Ct. 2926 (1990) 17

Holladay v. State,
805 SW 2d 464 (Tex.Crim.App. 1991) 19

In re Winship,
397 US 358 (1970) 8

In re Mosier,
59 Ohio Misc. 83, 394 NE 2d 368 (1978) 15

In the Interest of Doe,
54 Haw. 647, 513 P.2d 1385 (1973) 8

In re Gault,
387 US 1 (1967) 8

K.L.J. v. State,
491 So.2d 920 (Fla.App [1st Dist.] (1991)) 15

Lewis v. City of New Orleans,
415 US 130, 94 S.Ct. 970 (1974) 18

McCollester v. City of Keene,
514 F.Supp. 1046 (D.N.H. 1981) 13

McKeiver v. Pennsylvania,
403 U.S.528 (1971) 8

Meyer v. Nebraska,
262 U.S. 390 (1927) 15

Milwaukee v. Wilson,
96 Wis.2d 11, 291 NW 2d 452 (1980) 9

Panora v. Simmons,
445 NW 2d 363 (Iowa 1989) 7

Papachristiou v. Jacksonville,
405 U.S.156 (1972) 15

People v. Chambers,
66 Ill. 2d 36,360 NE 2d 55 (1976) 9

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 15

Riley v. National Federation of the Blind of North Carolina,Inc.,
487 US 781, 108 S.Ct. 267 (1988) 17

Ruff v. Marshall,
438 F.Supp. 303 (M.D. Ga. 1977) 13

Shelton v. Tucker,
364 US 479 (1960) 10,11

Stanley v. Illinois,
405 U.S. 645 (1972) 15

Thistlewood v. Trial Magistrate for Ocean City Worcester County,
236 Md. 548, 204 A.2d 688 (1964) 16

United States v. Chalk,
441 F.2d 1277 (4th Cir. 1971) 16

United States v. O'Brien,
391 U.S.367 (1968) 10

United States v. Reese,
93 US 214 (1976) 19

United States v. Sokolow,
490 US 1, 109 S.Ct. 1581 (1989) 19

W.J.W. v. State,
356 So.2d 48 (Fla. App. 1978) 15

Waters v. Barry,
711 F.Supp. 1125 (D.D.C. 1989) 10,11,12

Wisconsin v. Yoder,
406 U.S. 205 (1972) 15

Younger v. Harris,
401 US 37, 91 S.Ct. 746 (1971) 18

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STEVE BARTLETT, MAYOR OF THE CITY OF DALLAS, TEXAS, et al.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Elizabeth Qutb, Sabrina Qutb, James Poe, Alan Poe, E. L., P. L. (Juvenile) respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding, November 19, 1993, and rehearing denied, January 4, 1993.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 11 F3d 488 (Fifth Cir. 1993) and is set out in Appendix B ("App B"). The opinion of the United States District Court for the Northern District at Dallas is not reported and is set out in Appendix A.

JURISDICTION

The decision of the Fifth Circuit was entered on November 19, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

ORDINANCE INVOLVED

This case involves an ordinance of the City of Dallas amending Section 31-33 of Chapter 31 of the Dallas City Code. The ordinance is contained in Appendix D.

STATEMENT OF THE CASE

The Proceedings Below

This is an injunction action brought by juveniles and their parents challenging a juvenile curfew ordinance enacted by the City Council of Dallas, Texas. By agreement the ordinance has not taken effect. The ordinance was passed by the Dallas City Council on June 12, 1991. A complaint seeking a temporary and permanent injunction against enforcement of the ordinance was filed on July 3, 1991. Trial was held on July 22-23, 1991. The ordinance was amended on June 12, 1992. A final hearing was held on July 20, 1992.

The District Court's Decision

On August 10, 1992 the District Court permanently enjoined the City of Dallas from enforcing the curfew. The Court used a strict scrutiny analysis because the Court ruled that fundamental rights were involved. The Court found that the ordinance infringed upon the juveniles' freedom of association and the freedom to move about in public places (locomotion) App. A 19-20.

The Court further found that applying the triparte test enunciated in *Bellotti v. Baird*, 443 US 662(1979), the ordinance:

1) failed to establish any peculiar vulnerability of people under seventeen to engage in crime or become victims of crime. :

2) failed to establish any inability of persons under seventeen to make critical decisions concerning their exercise of the freedoms of association and locomotion in an informed, mature manner; and

3) improperly impinged upon the parental decisionmaking role concerning the rights of persons under seventeen to exercise freedom of association and locomotion. App. A 20-26.

The Court further found the City's data and testimony concerning the incidence of crime and crime victimization failed to justify the overly broad ordinance. App. A 32-34. Specifically the Court found that the City's data showed a statistically inconsequential occurrence of juvenile crime during curfew hours.

The Court concluded that the ordinance was not adequately tailored and was not the least restrictive means necessary to achieve the laudable goal of crime reduction. The Court reasoned that the inherent vagueness in the "defenses" vested unconstitutional discretion in law enforcement authorities. App. A 30-31.

Finally, the Court found, based upon the testimony of the Police Chief of the City of Dallas, that the ordinance would be applied selectively. In conjunction with the ordinance's failure to satisfy any prong of the *Bellotti* test, the Court concluded that the ordinance constituted a violation of the equal protection clause of the Fourteenth Amendment. App. A 35-36.

<u>The City's Basis For Appeal</u>

The City challenged the District Court's decision on several broad bases:

1) Juveniles have no fundamental freedoms of association or locomotion;

2) Because fundamental freedoms are not involved, a strict scrutiny test is not appropriate;

3) The crime data adduced at trial justified the ordinance under a rational relation test; and

4) The ordinance was constructed in such a manner that its application, by the use of defenses, could not infringe upon any recognized freedom.

The Fifth Circuit's Opinion

On November 3, 1993, the Court of Appeals reversed the District Court in an opinion in which two (2) judges concurred. The third judge on the panel concurred in the result but not the reasoning of the majority. The Court discounted the District Court's analysis of freedom of association but assumed that freedom of locomotion was fundamental and, therefore, applied a strict scrutiny test. However, the Court went on to decide that the City's interest in combating crime and reducing juvenile victimization rates was of paramount importance and therefore justified the curtailment of freedoms of association and locomotion. In reaching its decision the Court specifically declined to apply a full *Bellotti* analysis. Instead, the Court reasoned that the ordinance impinged upon no protected freedoms because the ordinance was worded in such a way that the officer on the street would not arrest anyone engaged in an exercise of free speech, religious practices, or emergency travel. In so doing the Court eschewed any notion that the "defenses" were defined in such a vague manner so as to preclude narrow enforcement or that the defenses per se could not protect against infringement of fundamental rights.

Motion For Rehearing

The Plaintiff Appellees filed a Motion for Rehearing urging the Court of Appeals to reconsider its Opinion in light of the Texas Penal Code, which differentiates between enforcement "exceptions" and trial "defenses". Further, the Plaintiff Appellees finally urged the Court to reconsider its holding that the defenses made an ordinance narrowly tailored, pointing out the broad discretion vested in law enforcement officials and the untimely redress of deprivations of fundamental rights. Fully, Plaintiff Appellees urged the Panel to conduct a full *Bellotti* analysis. This Motion was denied without written opinion on January 4, 1994.

STATEMENT OF FACTS

At trial the City adduced statistics concerning juvenile crime and victimization rates. Dallas does not keep statistical information concerning either (i) the number of minors who commit crimes in public during proposed curfew hours or (ii) the number of Dallas juveniles who are victims of crime in public during the proposed curfew hours.

The City did adduce proof that juveniles commit 5% or 6% of all the crime committed in the City during a 24-hour period. A statistical survey was run of 2,600 arrests made by the Dallas Police from January 1 to May 31, 1992. During this period of time 494 juveniles were arrested during curfew hours. The statistical survey does not indicate when the underlying crimes were committed. Juveniles were arrested in public places 316 times out of the 494 occurrences. Runaways account for 60 of these arrests. Of the remaining 256 arrests 26 (or 8%) involved assaultive offenses.

Tex. Penal Code Section 2.02 reads as follows:

(a) An exception to an offense in this code is so labeled by the phrase: "It is an exception to the application of ...."

(b) The prosecuting attorney must negate the existence of an exception in the accusation charging commission of the offense and prove beyond a reasonable doubt that the defendant or defendant's conduct does not fall within the exception.

(c) This section does not affect exceptions applicable to offense enacted prior to the effective date of this code.

Tex. Penal Code Section 2.03 reads as follows:

(a) A defense to prosecution for an offense in this code is so labeled by the phrase: "It is a defense to prosecution...."

(b) The prosecuting attorney is not required to negate the existence of a defense in the accusation charging commission of the offense.

(c) The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense.

(d) If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.

(e) A ground of defense in a penal law that is not plainly labeled in accordance with this chapter has the procedural and evidentiary consequences of a defense.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF STATE COURTS OF LAST RESORT

Six state courts of last resort have reviewed the constitutionality of juvenile curfew ordinances; four find the laws unconstitutional, and two uphold their constitutionality.

In *City of Maquoketa v. Russell*, 484 N.W.2d 179 (Iowa 1992), the Iowa Supreme Court recently invalidated a nocturnal juvenile curfew on federal constitutional grounds. The court held, *inter alia*, that a juvenile curfew regulation so restricted movement that it violated the first amendment: "Whenever the First Amendment rights of freedom of religion, speech, assembly, and association require one to move about, such movement must necessarily be protected under the First Amendment." *Id.* at 183 (quoting *Ervin v. State*, 41 Wis.2d 194, 200, 163 N.W.2d 207, 210 (1968)).[1] By necessarily offering only untimely redress for violations of first amendment freedoms, the regulation unconstitutionally burdened these freedoms.

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[1] The court cited with favor a law review article noting the connection between freedom of movement and first amendment liberties. *See* Note, "Assessing the Constitutional Validity of Juvenile Curfew Statutes," 52 Notre Dame Law. 858, 866 (1977) ("Even if [freedom of movement is] not viewed as a First Amendment right, if restrictions on movement have a direct or incidental impact on other First Amendment rights, more than a rational relation to a legitimate state purpose is needed to justify the restrictions"), *quoted in City of Maquoketa*, 484 N.W.2d at 183.

Additionally, the court, citing *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), recognized that minors right were not automatically coextensive with the rights of adults. Even in light of this difference, the Court held the ordinance was not narrowly tailored to protect first amendment rights. *Id.* at 186.[2]

In *City of Seattle v. Pullman*, 82 Wash.2d 794, 514 P.2d 1059 (1973) (en banc), the Washington Supreme Court held a juvenile curfew ordinance unconstitutional because made "no distinction between conduct calculated to harm and that which is essentially innocent." *Id.* at 1063. The court distinguished the breadth of the ordinance before it from that imposed in emergencies to restore public order, holding that the ordinance *sub judice* had an insufficient relationship to its objective. *Id.* at 1064.

In *Hayes v. Municipal Court of Oklahoma*, 487 P.2d 974 (Okla. 1971), the Oklahoma Court of Criminal Appeals held unconstitutional an ordinance that declared unlawful "loiter[ing] or wander[ing] aimlessly upon or [sic] about the streets, alleys, or other public highways, or parks" between 12:00 a.m. and sunrise. The court held that because the ordinance "punish[ed] conduct of an individual which in no way impinges on the rights or interests of others," it swept unnecessarily broadly and thereby invaded the area of protected freedoms. *Id.* at 978. "The prohibition was "constitutionally infirm because it does not differentiate conduct calculated to harm and that which is essentially innocent." *Id.* at 979 (internal quotations omitted).

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[2] The court may have overruled *sub silentio* its decision in *Panora v. Simmons*, 445 N.W.2d 363 (Iowa 1989), in which the court held constitutional a juvenile curfew ordinance. The *Maquoketa* court attempted to distinguish its prior opinion: "Pivotal to [the] holding was this court's determination that the 'minor's right of intracity travel is not a fundamental right for due process purposes.'" *Maquoketa*, 484 N.W.2d at 182 (quoting *Panora*, 445 N.W.2d at 364). The *Maquoketa* court then found that intracity travel was so integral to the exercise of first amendment rights that a fundamental right was implicated and the statute was constitutionally infirm. The effect of the latter is to overrule the former. Even assuming the court is correct, that a right is fundamental under one amendment but not another does not affect the constitutional analysis.

The court further recognized what the Fifth Circuit did not--that the ordinance placed unconstitutionally broad discretion in the hands of its enforcers: "Effective law enforcement does not require that the citizen on the streets is at the 'mercy of the officers' whim or caprice.'" *Id.* (quoting *Brinegan v. United States*, 338 U.S. 160, 176 (1949)). The law, the court noted, was inconsistent with the American system of constitutional government: "It is difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes." *Id.* at 980 (internal quotations omitted).

The Supreme Court of Hawaii held unconstitutional a municipal curfew ordinance prohibiting persons under 18 years of age from loitering in public places between 10:00 p.m. and sunrise. The court noted a Supreme Court trend toward recognizing the full constitutional rights of minors[3] and held the ordinance unconstitutionally overbroad because it "drew no distinction between conduct that is calculated to harm and that which is essentially innocent." *In the Interest of Doe*, 54 Haw. 647, 513 P.2d 1385, 1387 (1973) (internal quotations omitted). The court found that the ordinance was not narrowly tailored to advance the underlying governmental interests, holding that "its broad sweep has the effect of inhibiting otherwise lawful conduct." *Id.* at 1388.

The Supreme Court of Wisconsin held a curfew ordinance constitutional in *City of Milwaukee v. K.F.*, 145 Wis.2d 329, 426 N.W.2d 329 (1988). The court rejected arguments that the ordinance infringed fundamental rights, relying on the ostensibly augmented governmental authority to regulate the activities of children. *Id.* at 338-39. The court held that the ordinance, which restricted juvenile activity for "only" a narrow period of the day and "only" in public places, was narrowly drawn. *Id.* at 339.

The dissent did not argue that a properly drawn ordinance could be constitutional but questioned the precision of the ordinance

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[3] The court cited *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S 358 (1970); and *In re Gault*, 387 U.S. 1 (1967).

sub judice. Quoting a Wisconsin case, the dissenter questioned whether those enforcing or applying the law would be "relegated to creating their own standards of culpability instead of applying the standards prescribed in the law." *Id.* at 342 (quoting *Milwaukee v. Wilson*, 96 Wis.2d 11, 16, 291 N.W.2d 452 (1980)). All the judges, however, like the Fifth Circuit, seemed unconcerned with the conceptual problems inherent in enforcing a curfew law in a manner that "chills" the exercise of protected freedoms and belatedly postpones vindication of these rights to the time of trial.

The Supreme Court of Illinois rejected a challenge to the constitutionality of a state curfew, holding that the law was not aimed at fundamental speech interests protected by the first amendment. *People v. Chambers*, 66 Ill. 2d 36, 360 N.E.2d 55, 57 (1976). Like the Fifth Circuit, the Court brushed aside free speech concerns, holding that the mere lack of intent to affect free speech interests justified the statutory restrictions or negated any restrictions. The court further found that the *assumption* that "when a child is at home during the late night and early morning hours, it is protected from physical as well as moral dangers," was sufficient to justify what it defined as mere time, place, and circumstance restrictions. *Id.*

II.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER STATE COURTS AND FEDERAL DISTRICT COURTS.

The decision of the Fifth Circuit conflicts with all but one of the decisions of the United States district courts that have addressed the issue. Most recently, the United States District Court for the District of Columbia held unconstitutional a juvenile curfew ordinance identical in all pertinent respects to the Dallas ordinance. The decisions of the Fifth Circuit and the District of Columbia district court are remarkably inversely parallel.

First, while the Fifth Circuit rejected plaintiffs' argument that the ordinance as written infringed free speech liberties, the Waters court found the restriction unconstitutional, even if construed only

incidentally to impact protected speech interests. "From a First Amendment perspective, the Court cannot agree that the wholesale restriction of these juveniles' right is 'no greater than is essential' to furtherance of the District's interests." *Waters*, 711 F.Supp. at 1136 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).[4]

Secondly, the court reasoned that the law was neither narrowly tailored nor the least restrictive means of promoting a governmental interest:

> With this Act, . . . the District has chosen to address [the crippling effects of crime] through means that are stern to the point of unconstitutionality. Rather than a narrowly drawn, constitutionally sensitive response, the District has effectively chosen to deal with the problem by making thousands of this city's innocent juveniles prisoners at night in their homes.

Waters v. Barry, 711 F.Supp. 1125, 1135 (D.D.C. 1989). Unlike the Fifth Circuit opinion, which seems to hold that, once a compelling interest is established, any means of enforcement is justified, the court noted that when the government undertakes to limit fundamental rights, "it must act gingerly; it must do so in a manner that is narrowly focused on the harm at hand, as well as sensitive to needless intrusions upon the constitutional interests of the innocent." *Id.* (citing *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964) (legitimate state end "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved") (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). The District of Columbia ordinance did not satisfy this standard:

> The Act casts [fundamental] rights aside like so much

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[4] The Court further held that its analysis of the factors enunciated in *Bellotti v. Baird*, 443 U.S. 622 (1979), lended further support to its conclusion that the Act, if enforced, unconstitutionally would burden first amendment freedoms. *Waters*, 711 F.Supp. at 1137.

> straw. The Act subjects the District's juveniles to virtual house arrest each night without differentiating either among those juveniles likely to embroil themselves in mischief, or among those activities most likely to produce harm. The Act is a bull in a china shop of constitutional values.

Id. at 1134.

The court vigorously rejected the precise argument the Fifth Circuit found pivotal--that the inclusion of exceptions to a violation causes the ordinance to satisfy the "nexus" requirement of strict scrutiny:

> [I]t is what these curfews restrict, and not what they exempt, that matters most. The Act, even with its exemptions, prohibits every innocent juvenile in the District of Columbia from moving about this city as he or she pleases at night. . . . The restriction, although perhaps by its nature silent, would be massive.

Id. at 1136.[5] The court agreed that the exemptions were substantial and constitutionally significant but ruled that the Act "cannot help but 'broadly stifle' the fundamental liberty interests of thousands of perfectly innocent, law-abiding juveniles who live in or who may visit the District of Columbia." *Id.* This determination starkly contrasts with the conclusion of the Fifth Circuit that the Dallas ordinance is narrowly tailored and that "any burden this ordinance places upon minors' constitutional rights will be minimal." App. B. page 11.

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[5] Unlike the Fifth Circuit, the court was unimpressed by evidence of juvenile crime. "Although the recent arguments in this Court might suggest otherwise, the Court remains certain that the number of such innocent juveniles far exceeds the number of juveniles in this city who might be bent on nighttime crime." *Waters*, 711 F.Supp. at 1136.

The court further held that the Act violated the equal protection clause, noting that the distinction between juveniles and non-juveniles did not even rationally further the objectives, much less bear an intimate relation to the problem. Simple logic convinced the court that the Act's restrictions constitutionally were fatal:

> In order to reasonably effectuate its ends, the Act must correctly assume that those juveniles who currently leave their homes at night to engage in drug trafficking, or to engage in other illegal, violent behavior, will be deterred from doing so by the existence of a curfew law. The naivete of such an assumption is striking. Virtually everything that the Act seeks to thwart--violence, trade in illicit narcotics--is already illegal, and carries sanctions far more painful than a night of detention. Logic thus suggests that the only juveniles for whom the Act will likely have meaning will be those already inclined to obey the law. When fundamental interests are at stake, this inversion of anticipated effects renders the Act constitutionally unacceptable.

Id. at 1139.

Finally, the court held that the Act frustrated parental childrearing roles. Although the court recognized that the traditional family unit, in which parents exercise control over their children, has to some extent dissolved, the court noted that parental control still existed in "many thousands" of families in the District. *Id.* at 1137. As to these families, the court held, the Act "gracelessly arrogates unto itself and to the police the precious rights of parenthood." *Id.* Thus, the Act frustrates, rather than furthers, the parental role in childrearing. *Id.*

The District of New Hampshire twice held a juvenile curfew ordinance unconstitutional. In 1981, the court held the broad scope of the restriction was constitutionally intolerable: "[T]he conduct of the

minors not only is blameless under the law, but also may be totally innocent in nature." *McCollester v. City of Keene*, 514 F.Supp. 1046, 1052 (D.N.H. 1981), rev'd, 668 F.2d 617 (1st Cir. 1982) (allegations of complaint did not show personal stake in controversy necessary to establish Art. III jurisdiction). The court further held that the ordinance usurped parental rights, noting the existence of many situations within the purview of the ordinance in which the parent exercised reasonable control and guidance. *Id.* at 1053.

In 1984, the court held that amendments to the ordinance did not cure its constitutional defects. The court again noted the "broad range of innocent behavior" that the law criminalized, thereby infringing rights of personhood and privacy. *McCollester v. City of Keene*, 586 F.Supp. 1381, 1384 (D.N.H. 1984). The court easily found that the law impermissibly intruded on parental privacy interest in family and childrearing. "[The law] neither aids in the discharge of parental supervision duties nor qualifies as a justified usurpation of the parental role in a situation where parental control cannot otherwise be provided." *Id.* at 1386.

A Georgia district court easily found that a juvenile curfew ordinance "quite clearly" burdened, *inter alia*, free speech rights and parental privacy. *Ruff v. Marshall*, 438 F.Supp. 303, 306 (M.D. Ga. 1977). The court expressed concern over the necessary breadth of a blanket curfew provision, holding that such a law could not in any circumstance be constitutionally permissible. The means selected--the curfew--simply was not narrowly tailored to effectuate the end:

[C]urfews are constitutionally permissible only where there is some real and immediate threat to the public safety which cannot be adequately met through less drastic alternatives and where the curfew itself is tailored in duration and application so as to meet the specific crisis without unnecessary infringement of individual liberties.

Id. The court concluded that a curfew regulation could be constitutional only upon proof of an "immediate and significant threat such as pervasive rioting and looting." *Id.*

The only district court case to affirm a juvenile curfew ordinance applied an incorrect level of scrutiny and was decided prior to this Court's *Bellotti* decision. In *Bykofsky v. Borough of Middletown*, the Court took judicial notice of the "rapidly increasing crime rate among juveniles"[6] and found a rational relation between the end sought and the means chosen. *Bykofsky v. Borough of Middletown*, 401 F.Supp. 1242, 1255, 1256 (M.D.Pa. 1975), *cert. denied*, 429 U.S. 964 (1976). The court failed to recognize that the ordinance infringed upon rights fundamental to minors, instead improperly invoking the aegis of the state's police power and *parens patriae* role over minors. *Id.* at 1257-58.

The court further found that the Borough's notice procedure, requiring minors to give prior notice of the exercise of a first amendment right, did not violate the first amendment. *Id.* at 1258. The court noted, however, that the required giving of notice could not be equated with a prior restraint because no official was empowered to deny permission. *Id.*

The Dallas procedure, in contrast, does effect a prior restraint by allowing enforcement officials unfettered discretion to deny the exercise of a free speech right. Even under Borough procedure, a law enforcement official could determine that a minor's conduct did not in fact encompass free speech and take the minor into custody for violating the ordinance. *Id.* The court mischaracterized this arrest as "after-the-fact," rather than a prior restraint. *Id.* Like the Fifth Circuit, it failed to perceive that the mere granting of unfettered discretion to law enforcement officials to determine the exercise of a free speech right chills the exercise of these rights.

The court, like the Fifth Circuit, further failed to perceive the breadth of the infringement on constitutionally protected parental

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[6] Even if the court properly judicially notice the increase in crime among juveniles, it did not, and could not, judicially noticed the relative juvenile crime problem or the extent of nocturnal juvenile crime. Without some evidence of nocturnal public juvenile crime and data allowing comparison of daytime, adult, and non-public crime, the "fact" of which the court took judicial notice is meaningless.

privacy rights. The court reviewed Supreme Court precedent[7] and held, like the Fifth Circuit, that the exceptions minimized the burden. *Id.* at 1264. The *Bykofsky* court failed to recognize that the exacting demands of strict scrutiny required that the regulation be narrowly tailored and the least restrictive means of effectuating the end. The Fifth Circuit paid only lip service to these dictates.

Finally, the *Bykofsky* court rejected an equal protection challenge under a rational basis analysis. *Id.* at 1264-1266. The court selected its standard of review on the basis of its prior--and incorrect--ruling that the ordinance did not impinge on the exercise of any fundamental liberty.

The Supreme Court denied certiorari over the written objection of Justice Marshall, joined by Justice Brennan.[8] Justice Marshall stated that precedent supported the proposition that freedom of movement was a fundamental right,[9] thus invoking strict scrutiny. *Bykofsy*, 429 U.S. at 964. Marshall further reasoned that a blanket, nonemergency curfew could not survive constitutional scrutiny. *Id.* at 965.

Other courts have reviewed the constitutionality of blanket curfew provisions; most have declared the laws unconstitutional. See, e.g. *Brown v. Ashton*, 93 Md.App. 25, 611 A.2d 599 (1992); *K.L.J. v. State*. 491 So.2d 920 (Fla.App. [1st Dist.] (1991)); *City of Wadsworth v. Owens*, 42 Ohio Misc.2d 1, 536 N.E.2d 67 (Ohio Mun. Ct. 1987); *Allen v. City of Bordentown*, 216 N.J.Super. 557, 524 A.2d 478 (1987); S.W. v. State, 431 So.2d 339 (Fla. App. 1983); *In re Mosier*, 59 Ohio Misc. 83, 394 N.E.2d 368 (1978); *W.J.W. v. State*, 356 So.2d 48 (Fla. App. 1978). But see *City of Eastlake v. Ruggiero*, 220 N.E.2d

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[7] *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[8] Justice White also objected to the denial of certiorari.

[9] Justice Marshall cited *Papachristiou v. Jacksonville*, 405 U.S. 156 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); and *Hagen v. C10*, 307 U.S. 496 (1939).

126 (1966) (upholding constitutionality of curfew law). *Cf. United States v. Chalk*, 441 F.2d 1277 (4th Cir. 1971) (upholding constitutionality of limited emergency curfew law); *Chase v. Twist*, 323 F.Supp. 749 (E.D.Ark. 1970) (same); *Davis v. Justice Court of Pittsburg Judicial District*, 10 Cal.App.3d 1002, 89 Cal.Rptr 409 (1970) (same); *Glover v. District of Columbia*, 250 A.2d 556 (1969) (same); *Thistlewood v. Trial Magistrate for Ocean City, Worcester County*, 236 Md. 548, 204 A.2d 688 (1964) (same).

III.

THE FIFTH CIRCUIT'S DECISION IMPLICATES IMPORTANT ISSUES OF FEDERAL CONSTITUTIONAL LAW THAT THE COURT HAS NOT SETTLED BUT SHOULD DEFINITIVELY RESOLVE.

Curfew ordinances have proliferated across the nation. See *App. C.*[10] Governmental entities everywhere view the curfew as a means of solving the problem of rising crime. The purported solution is, however, merely an attempt to solve a systematic problem through an enactment that convicts the innocent, broadly stifles fundamental liberties and produces a chill over freedom of speech.

The City's curfew ordinance chills the exercise of first amendment rights and postpones the vindication of those rights until time of trial. As originally drafted, the curfew ordinance failed to provide for any hearing at all until three violations had occurred. The City voluntarily amended the ordinance in 1992. The amendment, on which the Fifth Circuit's opinion heavily relies, reads as follows:

> Before taking any enforcement action under this section, a police officer shall ask the apparent offender's age and reason for being in the public place. The officer shall not issue a

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[10]The list of cities, counties, and states is not definitive. The A.C.L.U. estimates that at least 1,000 communities across the nation have curfews in place or are considering enactment. The list was gathered from a solicitation of A.C.L.U. affiliates and a cursory Nexis search.

citation or make an arrest under this section unless the officer reasonably believes that an offense has occurred and that, based on any response and other circumstances, no defense in Subsection (c) is present.

If the presence of these defenses is meant to show the narrow scope of enforcement, the curfew is fundamentally flawed for three reasons: the curfew constitutes an unlawful prior restraint on free speech without timely remedy; the curfew vests an improper amount of discretion in the officer on the street; and the curfew ordinance improperly shifts the burden of proof.

UNTIMELY REDRESS

First, as petitioners argued before the District Court, "defenses" are not "exceptions". Tex. Penal Code §2.03 "Defense" quite clearly indicates that the exemption must be raised by evidence at trial. Since the arrest, of necessity, must precede the trial, a defense in Texas can in no way protect the exercise of fundamental rights except by deterring police abuse through acquittal. Vindication by an acquittal at trial can never make the accused whole since his "justifiable" conduct was pretermitted at an earlier occasion.

This belated relief underscores the inherent tension between this curfew ordinance and the exercise of fundamental freedoms. What differentiates this curfew from that legislation which imposes only a "minimal burden" on fundamental rights is the timeliness of the hearing. *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035 (1979), and *Hodgson v. Minnesota*, 110 S.Ct. 2926 (1990), impose temporal limitations which, in the context of a nine month pregnancy, cannot impair the ultimate exercise of the contested right. In fact, the Supreme Court has emphasized the need for a timely hearing to insure that the exercise of the fundamental right is not rendered moot by delay. *Bellotti* at 3049-50; *Hodgson* at 2944.

If an enactment does not contain a temporal limitation that prevents the State from suppressing protected speech without adequate procedural safeguards, the enactment is invalid because the delay "compels the speaker's silence". *Riley v. National Federation of the*

Blind of North Carolina, Inc., 487 U.S. 781, 794, 108 S.Ct. 2667, 2680 (1988).

Since even the Fifth Circuit assumed that some fundamental rights will be impaired, the lack of timely redress precludes a finding that the curfew's burden in such cases is minimal. In fact, such lost freedoms are never inconsequential. "The loss of First Amendment freedom for even minimal amounts of time unquestionably constitute irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1975).

IMPROPER DELEGATION

Secondly, the existence of a defense is rarely applied in law enforcement circles to preclude an arrest. Instead "...[t]he eternal temptation [is] to arrest the speaker rather than correct the condition about which he complains." *Younger v. Harris*, 401 U.S. 37, 65, 91 S.Ct. 746, 787 (1971) (Douglas, judge dissenting). Trial issues, such as defenses are quite properly left to the court system to decide. Like the ordinance in *City of Houston, Texas v. Hill*, 482 U.S. 469, 107 S.Ct. 2502 (1987), this ordinance places too much discretion in the hands of even well trained police officers to curtail protected freedoms. As with the "fighting words" Houston ordinance, and as Chief Rathburn candidly admitted, the curfew "will be enforced only if no other violation is found." The ordinance is therefore "susceptible of regular application to protected expression." This type of enforcement has traditionally been condemned. *Id.* at 465 n. 15 and cases cited therein. The predicted abuse occurs because, typically, the officer is prone to arrest and, at trial, "the only witnesses will be the police officer and the youth. All that is required for conviction is the officer's testimony." This scenario is pregnant with opportunities for abuse. *Lewis v. City of New Orleans*, 415 U.S. 130, 135-136, 94 S.Ct. 970, 973 (1974).

Moreover, in district court, the city police department admitted that it had not worked out its instructions to the "officer on the street" as to how to enforce the curfew. Therefore, the opinion's conclusion that the existence of a "defense" is a sufficient protection belies the reason for the temporary restraining order. There is a substantial likelihood that the police in enforcing the curfew will cast "too broad a

net". *Houston* 482 U.S. at 466.[11] There is a "heavy presumption" against the validity of enactments that may curtail First Amendment freedoms. In determining the validity of such enforcement, this court must be wary that an ordinance not delegate overly broad discretion to the government officials. *Forsyth County, Ga v. Nationalist Movement*, 112 S.Ct. 2395, 2401 (1992). This curfew constitutes such delegation.

SHIFTING THE BURDEN

Thirdly, there is a substantial likelihood that a police officer exercising a "reasonable belief" standard will enforce the ordinance in a broader manner than the courts would permit at trial. A "reasonable belief" is a much less stringent standard than "probable cause", which in turn is a far cry from "reasonable doubt."

Texas and Federal courts have employed the term "reasonable suspicion" to mean "more than an unparticularized suspicion or hunch, but considerably less than proof of wrongdoing by preponderance of the evidence." *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 1585 (1989); *Holladay v. State*, 805 S.W. 2d 464, 496 (Tex.Crim.App. 1991).

Ipso facto, the police are authorized to enforce the curfew in a manner that guarantees that some percentage of the arrests will be invalid. In any other context, a higher standard of proof would be required before such "prior restraint" would be tolerated. The curfew is meant to act as a deterrent; one which deters minors from being in public places at night. As such, the curfew will act as a prior restraint. The exceptional nature of the review of ordinances which may regulate freedom of expression, "is based upon an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." *F.W./P.B.S., Inc. v. City of Dallas*, 110 S.Ct. 596, 605 (1990).

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[11] "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully be detained..." *United States v. Reese*, 92 U.S. 214 (1976).

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit and reverse the decision below.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ELIZABETH QUTB, ET AL., *Plaintiff,*	*	
vs.	*	3:91-CV-1310-R
CITY OF DALLAS, ET AL., *Defendant.*	*	

MEMORANDUM OPINION

This class action involves the constitutionality of the Dallas juvenile curfew[1] ordinance -- which makes it a crime for persons under the age of 17 to use the city streets or to be present at other public places in Dallas between 11 p.m. and 6 a.m. on weekdays and between 12:00 midnight and 6 a.m. on weekends.

Some concerned citizens, including members of the *Oak Cliff*

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[1] The word "*curfew*" is derived from the French expression "*couvre feu*," which means "*to cover fire.*" See *Brewers Dictionary of Phrases & Fables* (Harper & Row 1970):

Curfew (ker' fu). The custom of ringing a bell every evening as a signal to put out fires and go to bed; also the hour for this and the bell itself. The word is from O.Fr. ***couvre feu***, cover- fire, which reveals its Norman origin. WILLIAM THE CONQUEROR instituted the curfew in England in 1068, at the hour of 8 p.m. The word is now extended to mean the period commonly ordered by occupying armies or government authorities in time of war or civil commotion when civilians must stay within doors.

The curfew "appears to have met with so much opposition" that it was repealed in 1103 by William's son, Henry I. *Blacks Law Dictionary* (6th Ed. 1990).

Concerned Citizens Against Crime, were the genesis of this child curfew ordinance. They presented these basic concerns to the Dallas City Council: that many parents (*particularly young, single parents*) were not properly supervising their children; that many juveniles were therefore becoming involved with crime, drugs, and gangs; and that innocent, unsupervised children were becoming the victims of criminal violence.

However, many concerned parents and teenagers were just as strongly opposed to any juvenile curfew. They presented these objections to the City Council: that the city had no business interfering with decisions made by parents in raising their children, including the curfews set by parents; that it was naive to think that city curfew would make anyone a more responsible parent or that a curfew would prevent any juvenile who has been involved with crimes, drugs, and gangs from continuing that misconduct; and that the real results of a curfew would accomplish little, if anything, except to subject thousands of innocent juveniles to virtual house arrest throughout Dallas.

After hearing citizens present these opposing and equally passionate views, the Dallas City Council passed the juvenile curfew ordinance. However, the Council had no information concerning either (i) the number of minors who commit crimes in Dallas during the curfew hours, or (ii) how many Dallas children were victims of crimes committed during the curfew. Instead, the city relied on the following rationale for the ordinance: juveniles commit a significant percentage of the crimes committed in Dallas, and some of this juvenile crime *must* take place during curfew hours; similarly, too many juveniles are victims of crime in Dallas, and some of these *must* take place during the curfew.

Subsequently, the very candid testimony of the Dallas Chief of Police added a new dimension to the curfew conflict -- that is, despite the hopes of its supporters, *this curfew will not be enforced throughout the city, nor will it be enforced against all Dallas children who are out of their homes in violation of the curfew.*

Specifically, he testified that:

(i) the Police Department will not be able to "reassign officers from other duties" in order to have the number of police that would be needed for the enforcement of this curfew;

(ii) the "*number of [curfew] arrests will be very, very small*"; and

(iii) the curfew law will be used only as "a tool to help solve . . . an ongoing problem at a [particular] location," such as juveniles "hanging around a crack cocaine house" during curfew or "gang members hanging around a certain location late at night."

With this background, the City argues that its juvenile curfew law is valid because the Dallas ordinance is patterned upon the 1975 opinion by a federal district court in Pennsylvania -- *Bykofsky v Borough of Middletown*[2] -- "the first federal case to adjudicate the constitutionality" of a juvenile curfew law.[3]

However, this argument simply ignores (i) the fact that there are three more recent decisions by federal district and appellate courts that reject *Bykofsky*, holding juvenile curfew ordinances to be unconstitutional because they violate the rights of freedom of association, due process, and equal protection guaranteed by the First, Fifth, and Fourteenth Amendments;[4] and (ii) the additional fact that numerous state cases have sustained constitutional levied against

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[2] 401 F.Supp. 1242 (M.D.Pa. 1975), *aff'd without opinion*, 535 F.2d 1245 (3rd Cir... 1976), *cert. denied*, 429 U.S. 964 (1976).

[3] *Bykofsky*, 401 F.Supp. at 1245.

[4] *See, e.g., Johnson v. City of Opelousas*, 685 F.2d 1065 (5th Cir.. Unit A 1981); *Waters v. Barry*, 711 F.Supp. 1125 (D.D.C. 1989); *McCollester v. City of Keene*, 586 F.Supp. 1381 (D.N.H. 1984).

juvenile curfew laws.[5]

Accordingly, following the substantial weight of authority, this Court holds that the Dallas juvenile curfew ordinance is unconstitutional because it violates the United States Constitution; and, as discussed below, the ordinance also violates the Constitution of the State of Texas. Therefore, the enforcement of the Dallas curfew for minors will be permanently enjoined.

This opinion first discusses the procedural history of the Dallas curfew ordinance. Then, it will state the facts established by the evidence. finally, it will discuss the applicable law and the reasons for this Court's conclusion that the juvenile curfew is unconstitutional.

I. The Procedural History

A. The Curfew Ordinance -- June 1991

On June 12, 1991, the Dallas City Council enacted a juvenile curfew law, Ordinance No. 20966, entitled "*Curfew Hours for Minors*" (the "Ordinance").[6] Appendix A to this opinion is a complete copy of this Ordinance.[7] It would apply to all children under the age

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[5] *See, e.g., K.L.J. v. State of Florida*, 581 So.2d 920 (Fla. Dist. Ct. App. 1991); *City of Maguoketa v. Russell*, 484 N.W.2d 179 (Iowa 1992); *Allen v. City of Bordentown*, 524 A.2d 478 (N.J. Super 1987). *See also*, Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 Harv. L. Rev. 1163 (1984); Note, *Nonemergency Municipal Curfew Ordinances and the Liberty Interests of Minors*, 12 Fordham Urb. L.J. 513 (1984).

[6] This Ordinance added new Section 31-33 to Chapter 31 ("Offenses-Miscellaneous") of the Dallas City Code.

[7] This June 1991 ordinance *was not* the first juvenile curfew in Dallas. The July 21, 1917 edition of the *Dallas Morning News* reported "a proposed city ordinance that would bar people under 18 from city streets between 9 p.m. and 4 a.m."; and, the same story noted that "a previous curfew ordinance . . . had been ruled invalid because of 'unreasonableness.'" *Dallas Morning News*, "Weathervane" (story by *Tracy Everbach*) (Sept. 26, 1992). Apparently, this "proposed curfew ordinance" was defeated because the Charter of the City of Dallas 1907 (*with amendments through May 1, 1931*) still contained this provision:
Sec. 316 MAY PROHIBIT MINORS IN PUBLIC PLACES.--The Governing Body

of 17[8] ("minors"),[9] to their parents, and to "privately-owned" business establishments. Curfew hours were from 11:00 p.m. to 6:00 a.m. on Sunday through Friday and from 12:01 a.m. to 6:00 a.m. on Saturday and Sunday. A minor would violate the curfew law if he remained[10] in any public place[11] or on the premises of any business establishment[12] within the City during curfew hours.

Under the Ordinance, Dallas police were to issue a written warning to any minor who was violating the curfew and order the minor to return home promptly by a direct route. If the minor had received two written warnings, or if there were "reasonable grounds . . . to believe the minor had engaged in delinquent conduct," the officer

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of Dallas shall have power to prohibit minors from going and being on the public streets and in public places in the City of Dallas between between the hours of 9 o'clock p.m. and 4 o'clock a.m., at night, without the consent of their parents of [sic] guardians.

[8] The Assistant City Attorney who presented the Ordinance to the City Council explained that minors "17 and older would not be affected by the curfew [and] that was based on at what age the State prescribes that you [can] be tried as an adult for your actions."

[9] The curfew would not apply to minors who are or have been married, and persons whose disabilities of minority have been removed pursuant to the Texas Family Code.

[10] The Ordinance defined "remain" as to "linger or stay unnecessarily; or fail to leave premises when requested to do so by a police officer or the owner, operator, or other person in control of the premises." *See* Appendix A.

[11] "Public place" was defined as "any street, alley, highway, sidewalk, playground, park, plaza, building, or any other place used by or open to the public." *Id.*

[12] "Establishment" was defined as "any privately-owned place of business operated for a profit to which the public is invited, including but not limited to any place of amusement or entertainment." *Id.*

could arrest the minor and deliver him to a holding location.[13] Once this was done, the police officer would contact the minor's parents, file an incident report, and eventually release the minor into parental custody. If, however, no parent could be located, the minor was to be released to the custody of juvenile authorities. Any minor charged with violating the Ordinance three times within a twenty-four month period was subject to prosecution in the Juvenile Court of Dallas County.[14]

Parents would violate the Ordinance if they *knowingly permit, or by insufficient control allow*, their minor children to remain in any public place or on the premises of any establishment within the city during curfew hours. An owner, operator, or employee of a business establishment would commit an offense by *knowingly* allowing "a minor to remain upon the premises of the establishment during curfew hours." Parents and owners, operators, or employees of a business establishment charged with violating the Ordinance were to be [sic] prosecuted in municipal court, with the punishment being a fine up to $500.00.

A minor found in the streets or some other public place during curfew could assert several defenses to prosecution. Specifically, there could be no curfew conviction if it were shown that the minor was: (i) accompanied by a parent during curfew hours or by a person at least twenty-one years old that had been authorized by a parent to have custody of the minor; (ii) on an errand with parental permission; (iii) in a vehicle engaged in interstate travel; (iv) engaged in an employment activity; or (v) involved in an emergency. In addition, a minor could not be prosecuted for being "on the sidewalk abutting" the minor's house the next-door neighbor's house, attending

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[13] "Holding location" was defined as a "place designated by the chief of police to which a minor taken into custody for a violation of this section will be delivered to await pick up by a parent or juvenile authorities." *Id.*

[14] The Ordinance provided that "a minor may not be prosecuted in municipal court for a violation" of the curfew law.

"an official school or religious activity," or exercising "First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech, and the right of assembly." To fall within the defense for errands, employment activities, and official school or religious activities, the minor had to be returning home via a "direct route."[15]

B. This Lawsuit

On July 3, 1991, this suit was filed by Elizabeth Qutb and three other parents -- individually and as next friend of their teenage children -- seeking a temporary restraining order and a permanent injunction against the enforcement of the juvenile curfew ordinance. The named as defendants the City of Dallas, the Dallas City Manager, the Dallas Chief of Police, and the Mayor and the other 10 members of the City Council.

On July 9, 1991, this Court ordered that the trial on the merits be advanced and consolidated with the hearing on the Plaintiffs' application for temporary and permanent injunctions.[16] The parties agreed to the certification of this suit as a class action with two subclasses: one of "persons under the age of 17' and the other of "parents of persons under 17 years of age."[17]

The case was tried on July 22-23, 1991. Although no temporary induction was entered, the City voluntarily delayed the enforcement of the curfew ordinance pending this Court's decision. (As

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[15] "Direct route" was defined as "the shortest path of travel through a public place to reach a final destination without any detour or stop along the way." *Id.*

[16] Fed.R.Civ.P. 65(a)(1).

[17] This agreed class certification was proper because the requirements of Rule 23(a) were met; specifically, the defendants acted on grounds "generally applicable to the class, thereby making appropriate final inductive relief . . . with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2).

discussed below, the Ordinance was amended on June 12, 1992, and additional evidence was presented at a July 20, 1992 hearing.)

C The Claims

At trial, Plaintiff raised several objections to the Ordinance. First, they claimed that enforcement of the curfew will abridge their rights to free speech and association as guaranteed by the First and Fourteenth Amendment. Plaintiffs also claimed that the Ordinance will violate their Fourth and Fourteenth amendment right against unreasonable searches and seizures, and divest them of their Fifth and Fourteenth Amendment rights to a presumption of innocence, proof beyond a reasonable doubt, and freedom from self-incrimination. Plaintiffs further argued that the Ordinance will deny them fundamental liberty and privacy interests protected by the due process clause of the Fourteenth amendment, and Equal Protection under the laws.[18] Lastly, Plaintiffs claimed that the Ordinance is vague and overbroad.

The City denied the unconstitutionality of the Ordinance. It argued that the minors do not have any fundamental interest [sic] at stake, and that the Ordinance is rationally related to the City's stated objectives. The City further arguedthat even if the rights burdened by the Ordinance are fundamental, the Ordinance is narrowly tailored to serve the compelling governmental itnerests of reducing the number of crimes committed by juveniles, reducing the number of juvenile victims of crime, and enhancing and encouraging the parental role.[19] Finally, the City asserted that the Ordinance is not overbroad or

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[18] Because the Court finds for Plaintiffs on the First and Fourteenth Amendment claims of due process, freedom of association, and equal protection, and on claims based on two provisions of the Texas Constitution, it will not address Plaintiffs' other argument.

[19] The City also raised the question of standing with respect to juvenile class members who are over sixteen years old. This contention does not affect the class action because there are class representatives who are under seventeen. One of the named juvenile plaintiffs was 17 years old when suit was filed; under the law -- and the agreed motion for class certification -- she cannot represent the class, but can

impermissibly vague.

Plaintiffs also levied several specific attacks on both the language and substance of the Ordinance. For example, Plaintiffs contended that: (i) the definition of a "public place" would permit minors who lived in apartment buildings to gather in parking lots during curfew hours; (ii) that the term "direct route" was so vague and ambiguous that it would permit the arresting officer to make a purely subjective determination in each case as to whether the route chosen was the most expeditious; and (iii) that the exceptions for attendance at "official school or religious" activities was so narrow that it would preclude minors from attending activities sponsored by civic and charitable organizations. The City denied that these terms presented any real problem to the effectiveness or the constitutionality of the Ordinance.

Finally, Plaintiffs challenged the enforcement provisions of the Ordinance on the basis that they violated the

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maintain an individual cause of action.

This action also raises the question justiciability. Chief Rathburn testified at the August 1991 hearing that the police would not enforce the Ordinance before this Court ruled on its validity. After the amended Ordinance was passed, the City agreed with Plaintiffs to suspend enforcement until after the July hearing and a ruling by this Court. Nonetheless, declaratory and injunctive relief are appropriate. A preenforcement challenge can be maintained if the plaintiffs "have alleged an actual and well-founded fear that the law will be enforced against them." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). *See also Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979)(a preenforcement plaintiff must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest but proscribed by a statue"). Sympathy toward preenforcement challenges is heightened in First Amendment cases because of the danger that "law abiding" conduct will result in self-censorship. *Waters v. Barry*, 711 F.Supp. 1125, 1129 (D.D.C. 1989)(*citing American Booksellers*, 484 U.S. at 393). Several minor plaintiffs testified at the hearing that they have engaged in numerous activities which the Ordinance seeks to prohibit. Enforcement of the Ordinance, therefore, would subject Plaintiffs to a well-founded fear of prosecution, *Clements v. Fashing*, 457 U.S. 957, 962 (1982), thereby creating an actual case or controversy.

Fourteenth Amendment guarantee of procedural due process. Here, Plaintiffs claimed that -- because n prosecution would occur until after the third curfew violation -- juveniles were denied the right to contest the first or second written curfew warning; that they could not challenge these warnings until charges of a third curfew violation had been filed; that, even the, the Ordinance denied them any right to a hearing the municipal courts; and that by the time a curfew case was heard in Dallas County juvenile court, the possibility of unavailable witnesses and faded memories would deprive the juveniles of any fair trial on the curfew offenses.

D. The Amended Ordinance -- June 1992

On June 10, 1992, the Dallas City Council amended the juvenile curfew law by enacting Ordinance No. 21309, also entitled "*Curfew Hours for Minors*."[20] Appendix B to this opinion is a complete copy of the amended Ordinance. On July 1, 1992, an agreed order was entered substituting as defendants the current Mayor and the new members of the 14-1 Dallas City Council.[21]

The amendments to the Ordinance were substantial. The City changed the definition of a public place to "any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office building, transport facilities, and shops."[22] The age of an adult that could be appointed by a parent or guardian to have custody over a minor was reduced from 21 to 18. The "direct route" requirement was deleted from the defenses to prosecution, and was replaced by the requirement that a minor return

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[20] This Ordinance amended Section 31-33 of Chapter 31 ("Offenses-Miscellaneous") of the Dallas City Code.

[21] *See williams v. City of Dallas*, 734 F.Supp. 1317 (N.D. Tax. [sic] 1990).

[22] *See*, Appendix B.

from the activity "without any detour or stop." The City also added a definition for "guardians" and expanded the exception for official school or religious activities to include any recreational activity that is supervised by adults and sponsored by the City of Dallas, a civic organization, or other similar entity that takes responsibility for the minor.[23]

The most substantial changes were made to the enforcement provisions. The entire procedure of issuing warnings, followed by a trial in the County juvenile court after a third curfew offense, has been deleted. Instead, the Ordinance now authorizes the police to arrest a minor or issue a citation by the following provision:

Before taking any enforcement action under this section, a police officer shall ask apparent offender's age and reason for being in the public place. The officer shall not issue a citation or make an arrest under this section unless the officer reasonably believes that an offense has occured and that, based on any response and other circumstances, no defense in Subsection (c) is present.

If convicted, the minor is subject to a fine not to exceed $500.00 for each separate offense.[24] Parents or guardians, or owners, operators, or employees of a business establishment are also subject to a maximum fine of $500.00 for each separate violation of the Ordinance.

On June 25, 1992, Plaintiffs filed an amended complaint and an amended motion seeking a permanent injunction against the amended Ordinance. In addition to the federal claims, Plaintiffs added the claim that the amended Ordinance violates the Texas Constitution. Specifically, Plaintiffs contend that Ordinance violates Article I, section 3 (equal rights), 6 (freedom of religion), 8

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[23] *Id.*

[24] The Ordinance defines an offense as each day or part of a day during which a violation is committed, continued, or permitted. *Id.*

(freedom of speech), 9 (searches and seizures), 10 (criminal rights of accused), 19 (due process), and 29 (exception of Bill of Rights from powers of government) of the Texas Constitution. At a hearing on July 20, 1992, both sides presented evidence and arguments concerning the amendments to the Ordinance and its validity under the federal and state constitutions.[25]

II. The Facts

This summary of the credible testimony and exhibits introduced at trial (July 22-23, 1991), and at the subsequent hearing concerning the amende Ordinance (July 20, 1992), constitutes this Court's findings of fact under Fed.R.Civ.P. 52(a).

A. The Plaintiffs

The plaintiffs presented the testimony of one parent class representative and the testimony of the four minors -- ages 15, 16, 16 and 17[26] -- whose parents filed this suit.

the parental curfews

The parent testified that it was her role, as the widowed mother of 16 and 18 year-old daughters, to set the time that her children were to be home at night; that she "thinks she can do a better job than the police" in this regard; and that the government should have no part in making that determination. She also explained

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[25] The addition of the claims under the Texas Constitution will permit the resolution of *all* constitutional questions concerning the Ordinance, thus reducing the time and expense of this litigation to all parties. *C.f. Baker v. Wade*, 553 F.Supp. 1121 (N.D. Tax. [sic] 1982) and *State of Texas v. Moralels*, 826 S.W.2d 201 (Crt. App. – Austin 1992, writ granted).

[26] The 17 year-old female plaintiff testified that "she was only 4' 9" tall," and was "constantly mistaken as being younger than 17"; for example, just three weeks before her testimony, the ticket seller at a movie thought that she was "only 12 years old and gave her a child's ticket." She was, therefore, concerned that the police would arrest or cite her for curfew violations even though the Ordinance does not apply to her.

that her 16 year-old daughter would soon be going away to college; that her daughter needed experience "in making her own decisions before leaving home"; that she therefore permitted the 16 year old to "tell me when she will be home"; and that this was usually by 1:00 a.m. (unless her daughter "calls if these plans change").[27]

The four juvenile witnesses gave similar testimony about their family curfews. The first (who was 16) testified that she had no set curfew "most nights"; that sometimes it was 1:00 a.m.; but that she always called her mother "if she was going to be later than this." The second (who was 16) testified that "she had no set time to be home," but that on one unusual occasion "she was *allowed* to stay out until 3:00 a.m." The third (who was 15) testified that he and his parents always "*agreed* on the time he is to be home." The fourth (who was 17) was not asked if she had a set curfew, but testified that "the latest she got home was 12:30 or 1:00 a.m."

These four juveniles also believe, very strongly and very sincerely, that it is wrong for "the government to tell me when to go home" -- and that it "should be [my] parents who make this decision."

effects of the curfew

The four juvenile witnesses were also concerned, to say the least, about the effects that the Dallas curfew would have upon their civic and charitable work, upon some school activities, and upon their personal lives.

Their civic and charitable activities included volunteer work for Children's Hospital, Presbyterian Hospital, the March of Dimes, Cerebral Palsy, Amnesty International, and local theaters. The minors were concerned that this volunteer work would often require

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[27] This same parent told the Dallas City Council on June 12, 1992 that "Parents have their hands full trying to prevent life-threatening mistakes: drinking and driving, drugs, promiscuity. And *they should not have to worry about preaching the dangers of artificially created crimes such as an 8:30 movie."*

them to be out later than the curfew hours. The expressed the same concern about some school-sponsored activities, including school or class parties and dances, school plays, and the Texas High School Mock Trial Competition.[28]

In addition, the four juveniles objected to the effects that the curfew would have upon their personal lives -- going to movies, plays, concerts, the symphony, or the opera; going with friends to dinner, parties, or "teen clubs"; visiting or studying with classmates; making money by baby sitting; dating a 17-year old (who would not have to be home by 11 p.m. on weekdays or midnight on weekends); walking the dog during curfew hours; or just "walking around" early in the morning or late at night.[29]

B. The City Witnesses

The City presented the testimony of two private citizens associated with the *Oak Cliff Concerned Citizens Against Crime*, two members of the Dallas City Council, and four members of the Dallas Police Department (including Chief of Police William M. Rathburn).

private citizens

Dan [sic] Pemberton, one of the two Chairpersons of *Oak Cliff Concerned Citizens Against Crime*, testified that her

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[28] This evidence was presented at the July 22, 1991 trial. At that time the original curfew ordinance exempted only "*attending an official school or religious activity.*" Subsequently, the amended Ordinance exempted attendance of an official school, religious, or *other recreational activity supervised by adults and sponsored by they city of Dallas, a civic organization, or any similar entity that takes responsibility for the minor.*" As will be discussed later, however, the revised exception contains its own problems.

[29] On cross-examination, the City suggested that these effects of the curfew could be minimized by such things as "*taking your parents along*" to the movies, plays, or on a date; or by "*letting your mom walk the dog*"; and that there would be "no damage" if the teenagers "just missed part of the party, dance, concert, etc."

organization proposed the curfew to three members of the Dallas City Council; that she circulated petitions for the adoption of the curfew ordinance; that she supported the Dallas curfew at meetings of the Dallas Public Safety Committee and before the Dallas City Council; and that she believes the curfew is necessary to "protect our young people," to "identify and monitor young people with problems," and to "save our children." On June 13,1991, Mrs. Pemberton told the Dallas City Council:

"We don't know how many lives the curfew will save. But if it saves one, if it protects that four-year-old, if it says to them, "The streets [are[not the place for you," then it's time for a curfew."[30]

Dr. Charles Hunter, a minister and sociologist and the other Chairperson of *Oak Cliff Concerned Citizens Against Crime*, testified that he supports the juvenile curfew because it "establishes a basis to protect children who could be victimized," because it can "help cut down on the involvement of minors in wrong activities," and because "it will benefit parents by providing" support for their efforts "to keep younger members of the family at home" during curfew.[31]

Dr. Hunter also told the City Council on June 12, 1991 that "I think [the curfew] will be used as a tool. It is not expected to be a cure-all."

council members

City Council Member Al Lipscomb testified that he made the motion for the adoption of the curfew; that "kids who should be home asleep" were "acting as lookouts for drug pushers" who were

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[30] In response, Plaintiff's suggest that – while the death of any child is tragic – to use this as *the* justification for a curfew which removes all juveniles from the streets and public places would like clearing the streets of Dallas of all cars (or reducing the speed limit 20 miles per hour) to reduce the substantial number of child deaths caused by automobile accidents.

[31] Both Mrs. Pemberton and Dr. Hunter also testified that they strictly enforced *a 10:00 p.m. curfew* (with occasional exceptions) while their children were growing up.

"running crack houses"; that some single parents "just cannot control their 13, 14, and 15 year-old kids"; and that, even if the curfew law were enforced only in minority areas of the city, he would have no objections if "it keeps our children from being killed."

City Council Member Diane Ragsdale testified that several other citizen groups or neighborhood associations (following the lead of *Oak Cliff Concerned Citizens Against Crime*) also supported the curfew; that she "feels that single parents need assistance" and the curfew "can aide these single parents"; that she believes the curfew can "minimize the peer pressure" that often causes "youths to commit crimes"; and that "it was up to the city attorneys to come up with a curfew ordinance that would be constitutional."[32]

Police Chief Rathburn

Dallas Chief of Police William Rathburn testified that "the primary value [of the curfew] is in reemphasizing and reaffirming parental responsibility to control behavior of kids: -- and that its "primary value is not how many people we can arrest, [but] how many parents we can get to exercise proper control over their kids."

However, although he strongly supported the curfew ordinance, Chief Rathburn made it clear -- in his very candid and credible testimony -- just how the Ordinance would be enforced by the Police Department:

CHIEF RATHBURN: First let me say I do not plan to reassign officers from other duties just to enforce any kind of a curfew ordinance. I think that we will make no doubt over a period of time some arrests for curfew [violations], but *I think the arrests, the number*

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[32] Council members Lispcomb and Ragsdale are African American; so are the two private citizens who appeared for the *Oak Cliff Concerned Citizens Against Crimes*. However, other African Americans strongly opposed the Ordinance; for example, *Roy Williams* -- one of the plaintiffs in the case which lead to the 14-1 City Council, *Williams v. City of Dallas*, 734 F. Supp. 1317 (N.D. Tex. 1990) -- testified against the Ordinance before the City Council.

of arrests, will be very, very, small. . . .

What I mean by it will be a tool to help solve problems is, if we have an ongoing problem at a location and there are juveniles involved, and we cannot impact the problem in others ways, and there is a -- a violation of [the] curfew ordinance, then we will use that authority to deal with the problem to try to solve the problem.

THE COURT: Could you give me a specific example of what you're talking about?

CHIEF RATHBURN: Yes. If we have a -- a drug house we suspect -- a house we suspect is dealing in drugs and --

THE COURT: Crack house.

CHIEF RATHBURN: Crack house, and there are people hanging around it all the time, some of them are juveniles late at night, we might use the curfew ordinance as one of the enforcement tools. If there's not some other violation that we can use, we might use that authority.

THE COURT: Gangs?

CHIEF RATHBURN: Gang members hanging around a certain location late at night, no other enforcement tool for us to use, we might use [the] curfew ordinance as a basis for our authority to at least stop and question people involved.

Chief Rathburn also testified that he knew of no statistics which the Police Department had that show the number of "juveniles committing crimes during the curfew hours"; that he felt the curfew "would have more impact" in areas of the city with "the highest crime rate"; but tat "if we can keep the juveniles off the street late at night, I think that would probably save some lives."

<u>other police witnesses</u>

The other three members of the Dallas Police Department testified -- in agreement with Chief Rathburn -- that the City has no information concerning either (i) the number of juveniles who commit crimes in Dallas during the curfew hours, or (ii) how many

Dallas children were victims of crimes committed ruing the curfew.

C. The City Council

The City Council held public hearings before the original curfew ordinance was passed.[33] At the final meeting (June 12, 1991), thirty-three people addressed the Council; 14 of these speakers supported passage of the juvenile curfew, but 19 speakers opposed this ordinance.

During the Council discussions that followed, only one member spoke in opposition to the curfew ordinance (although two others expressed reservations about the effectiveness of the juvenile curfew). One councilman stated: "We have been promised today that we will have a legal test. *So if it is illegal, we don't need to worry about an illegal law being enforced.*"[34] After these discussions, the *Curfew Hours for Minors* Ordinance passed by a 10-1 vote.

III The Law

A. The Constitutional Arguments

Plaintiffs argue that the broad restrictions imposed on minors by the Ordinance violate the minors' fundamental First Amendment rights of free speech and association, and Fourteenth

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[33] Prior hearings had been held by the Council's Public Safety Committee. The exhibits introduced at trial include the minutes and tape cassettes of the Public Safety Committee meetings and a transcript of the June 22, 1991 meeting of the City Council.

The Council's Public Safety Committee also held public hearings concerning the amended Ordinance; taped cassettes of these April 10 and May 15, 1992 meeting were introduced at the July 20, 1992 hearing before this Court.

[34] As stated in *Waters v. Barry*, 711 F.Supp. at 1127, the city's "elected officials. . . . are entitled to deference as the Court reviews" the claims that the juvenile curfew law is unconstitutional.

Amendment liberty guarantees.[35] They assert that minors possess a fundamental right to use public streets and public places, freely and without restrictions, i nthe same manner as adults. Plaintiffs also claim that the Ordinance stifles this right in an overly broad manner,[36] relegating a variety of protected conduct to daytime hours. Lastly, Plaintiffs contend that the Ordinance violates Equal Protection under the Fourteenth Amendment and several provisions of the Texas Constitution.

Defendants deny that the Ordinance violates either the federal or the state constitution. Specifically, they contend that the Ordinance does not regulate speech because it does not impose any burden on the content of any speech; that the Ordinance does not regulate protected expressive conduct such as flag burning or draft card burning, or the freedom to engage in intimate relationships or expressive association; and that the Ordinance is concerned mainly, if not entirely with noncommunicative conduct -- remaining in public during curfew hours without accompaniment by an adult. Defendants also argue that minors do not possess the fundamental right enjoyed by adults to wander about the streets freely, and that the Ordinance imposes a minimal burden on a minor's ability to attend social and entertainment functions.

B. Freedom of Association

The right to associate freely, although not specifically

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[35] Plaintiffs also contend that the First Amendment defense from prosecution operates as a prior restraint of their free speech. Because of the changes in the enforcement provisions of the amended Ordinance, and because of the Court's findings on the issue of the right to move about the streets of the city, the Court will not address this claim.

[36] Plaintiffs also allege that the Ordinance is unconstitutionally overbroad. The Court finds that an overbreadth analysis is inappropriate. While there are substantial problems with the Ordinance, constitutional overbreadth is not one of them. *See Waters v. Barry*, 711 F.Supp. 1125 (D.D.C. 1989).

guaranteed by the Constitution, is nonetheless a fundamental right.[37] The Supreme Court has expressly upheld the fundamental nature of the right of association in two different lines of cases: intimate relationships under the Fifth Amendment,[38] and the right to associate under the First Amendment for purposes of speech, assembly, petition of grievances, and religion.[39] Although the Court has not specifically upheld the right to associate for social purposes, it has recognized the right in several decisions,[40] along with the right to move about freely in public places.[41] The Fifth Circuit has both recognized[42] and upheld[43]

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[37] *Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1988); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion).

[38] *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

[39] *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

[40] *See, e.g., Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974) (right to associate for social clubs or organizations) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-180 (1972) (Douglas, J. dissenting)); *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1970) (recognizing the First and Fourteenth Amendment right to gather in public places for social or political purposes); *Griswold v. Connecticut*, 381 U.S. at 483 (free association not limited only to political assemblies, but also those that pertain to "social, legal, and economic benefit").

[41] *See e.g., Papachristion v. City of Jacksonville*, 405 U.S. 156, 164-65 (1972) (discussing the right to walk, wander, or stroll without any reason as failing in the "sensitive First Amendment area"); *Aptheker v. Sec'y of State*, 378 U.S. 500, 520 (1964) (discussing freedom of movement as "kin to the right of assembly and to the right of association").

[42] *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir., Unit B 1981)(recognizing First Amendment right to associate for social purposes and the right of "all citizens" to travel freely within and between states without unreasonable governmental burden).

the rights of social association and locomotion, as have a number of other federal courts, whether these rights be grounded in the First, Fifth, or Fourteenth Amendment.[44] Because of these authorities, this Court is convinced that, as presented in this case, the right to associate for social purposes and to use public streets and public places freely is a fundamental liberty under the First and Fourteenth Amendments,[45] so longs as it does not interfere with the personal liberty interests of

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[43] *Alladin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1041-42 (1980)(upholding fundamental right to "go where one pleases"), *rev'd in part and remanded other grounds*, 455 U.S. 283 (1982), *on reh'g*, 713 F.2d 137 (5th Cir. 1983); *Sawyer v. Sandstrom*, 615 F.2d 311, 316-17 (1980) (granting constitutional protection to associating on street corners).

[44] *See, e.g., Gomez v. Turner*, 672 F.2d 134, 143-44 n.18 (D.C. Cir. 1982)(stating. that
"citizens can walk the streets without explanation or formal papers, is surely among, the cherished liberties that distinguish this nation from so many others");
Waters v. Barry,
711 F. Supp. 1125, 1134 (D.D.C. 1989)(characterzing the right to walk the street whenever one pleases as an "integral component of life in a free and ordered society"); *Johnson v Carson*, 569 F. Supp. 976(M.D. Fla. 1983)(stating that " '[t]he rights of locomotion, freedom of movement to go where one pleases, and to use the public streets in a way that des not interfere with the personal liberties of others are implicit in the first and fourteenth amendments")(quoting *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1241 (M.D.Pa. 1975), *aff'd without opinion*, 535 F.2d 1245 (3rd Cir.), *cert. denied, 429 U.S.964 (1976)*.

[45] Defendants do not contest this point, at least with respect to adults. Defendants argue, however, that juveniles do not enjoy a fundamental right to wander about the City's streets freely. Defendants ground this argument on *City of Dallas v. Stanglin*, 490 U.S. at 24, which holds that chance meetings in dance halls and other purely recreational functions are not protected by the First Amendment. This Court agrees with the finding in *Waters v. Barry*, 711 F.Supp. at 1135 n. 16, that although *Stanglin* excluded chance encounters in dance halls involving hundreds of teenagers from First Amendment protection, a juvenile curfew ordinance operates in a much more "blunderfuss" fashion and proscribes a wide range of protected First Amendment activities that were no addressed in *Stanglin*. *Stanglin*, therefore, is distinguishable on these grounds.

another.

The Constitution protects minors as well as adults. "'Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.'"[46] Yet, it is also clear that the state's authority to restrict the behavior of minors is more extensive than its authority over adults.[47] A state has the authority to restrict minors in ways that would be unconstitutional if applied to adults, however, only if the restrictions further a "'significant state interest . . . that is not present in the case of an adult.'"[48] In *Bellotti v. Baird*,[49] the Supreme Court formulated a three-prong test to identify situations in which the state can place restrictions on minors that it cannot impose on adults: "the *peculiar* vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in childrearing."[50] The City asserts that these factors are present with respect to the Dallas curfew. It claims that none of the teenagers who testified at the hearing displayed a recognition f the dangers of the street, and asserts that the inexperience of youth and the breakdown of the traditional family unit demonstrate the need for a juvenile curfew ordinance. However, the City's arguments are belied by a proper application of the *Bellotti* factors.

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[46] *In re Gault*, 387 U.S.1, 13 (1966) (upholding the application of the Fourteenth Amendment and Bill of Rights to minors) (quoting *Haley v. Ohio*, 332 U.S. 596, 601 (1948)).

[47] *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

[48] *Carey v. Population Services Int'l*, 431 U.S. 678, 693 (1972) (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976)).

[49] 443 U.S. 622 (1979).

[50] *Id.* at 634.

Peculiar Vulnerability:

In Johnson v. City of Opelousas,[51] the Fifth Circuit's reasoning made it clear that there is no justification under the first *Bellotti* -- vulnerability of minor -- for reducing the level of minors' constitutional protections by a juvenile curfew ordinance:

> [T]here is no issue of *peculiar* vulnerability of children with respect to their attending or traveling to or from a religious, school, commercial, or other bona fide organized activity during nighttime. Similarly, no issue of peculiar vulnerability of children is presented by a minor's being on the sidewalk in front of his house a night, engagin in legitimate nighttime employment, or traveling through Opelousas at night. These activities do not involve a minor's special vulnerability to the extent which justifies differing juvenile criminal proceedings. . . .[52]

The evidence did not establish that minors are *peculiarly* vulnerable to the dangers posed by crime on Dallas's city streets during curfew hours. Instead, the City presented only general, episodic testimony on this first *Belloti* factor. For example, Police Chief Rathburn testified that "often we have robberies where *people* have stopped their car for a [traffic] signal." The Chief concluded from this that some of these robberies must be involved "*juveniles* driving around at night." He also mentioned "drive-by shootings," a problem involving both gang- and rug-related violence. However, from Chief Rathburn's testimony and

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[51] 658 F.2d 1065 (5th Cir. Unit A 1981). As stated by the Court in *Waters*:

> As to the first factor, it is obvious that the plague afflicting the District poses no *peculiar* danger to children; those thousands of the District's juveniles who engage in wholly legitimate nocturnal activities are no more endangered in the current climate than are the District's adults. The violence is ubiquitous; it afflicts all of us.711 F. Supp. at 1137.

[52] 658 F.2d at 1073 (citations omitted).

other evidence, it was clear that neither the car robberies nor the drive-by shootings were limited to -- or even more prevalent with -- persons below the age of seventeen.[53] Criminal violence is indiscriminate and tolls its victims from the general population at all times of the day and night,[54] not just teenagers during curfew hours.[55] Moreover, the curfew is sure to restrict many innocent, productive activities that pose no issue of particular vulnerability to minors, such as participating in theater, sponsoring a haunted house during Halloween, or simply taking a walk around the block at night with a friend after studying. Therefore, the first factor in *Bellotti* is not present in this case.

Immaturity:

The second *Bellotti* inquiry focuses on the inability of juveniles to make critical decisions in an informed, mature manner. To be sure, youths frequently face profound decisions, such as whether to marry or obtain an abortion, that they may be ill-equipped to decide with adult reasoning. Yet so many activities restricted by the curfew

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[53] Dallas Police Department estimates were that some 2893 persons were members of gangs in 1990; *that 1563 of these were adults* and 1330 were juveniles; and that the gang members ranged in age from 10 to 25.

[54] *See Johnson*, 658 F.2d at 1053; *Waters*, 711 F.Supp. at 1137. The City does argue that "drive-by shootings" are peculiar to young adults. This is a particularly violent and random tactic employed in gang warfare whereby gang members kill one another by driving in a rival gang's neighborhood and firing weapons from their cars at youths hanging around in the streets. However, as indicated above, *54% of the gang members in 1990 were adults*. Moreover, there was no evidence that drive-by shootings occur mostly to youths under the age of seventeen years old and mostly during curfew hours and in public places.

[55] City Council man Al Lipscomb also testified about a type of crime that, he thought, might pose peculiar difficulties for juveniles: crack cocaine sales. He testified that many young children were acting as "lookouts" for these drug pushers late at night when they should be at home asleep. As with gang involvement, however, the Court finds that these dangers, *although quite real*, are not shared by the City's youth as a whole; in fact, none of the minor plaintiffs that testified had confronted these problems. Restricting the freedom of the entire city, therefore, is a drastic solution.

present none of the difficult choices that *Bellotti* would relegate to the state.[56] The decision whether to attend a concert at Starplex, get something to eat after a movie, or stay late at a friend's house does not confront a juvenile with the "potential serious consequences" as does, for example, the choice to purchase pornographic material.[57] Therefore, the second *Bellotti* factor is also inapplicable in this case.

The Parental Role:

The final focus in *Bellotti* is on the importance of a parent's role in childrearing -- that is, whether the restrictions imposed by the Ordinance are supportive of the parental role.[58] This concern is fundamentally disserved by the juvenile curfew ordinance. As stated in *Johnson v. City of Opelousas*:

Finally, to the extent that it prohibits minors from engaging in these activities, the curfew ordinance inhibits rather than promotes the parental role in child-rearing, the third listed justification for greater restrictions on the rights of minors . . . . "[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[59]

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[56] As stated by the court in *Waters*:

[T]he decision to either stay inside or roam at night simply does not present the type of profound decision we would leave to the state. A decision to leave the house does not lead inelectably to nighttime violence; in all but the exceptional case, nocturnal activities, even by juveniles, will not have "serious consequences."

711 F. Supp. at 1137. *See also Johnson*, 658 F.2d at 1073.

[57] *Bellotti* , 443 U.S. at 636 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968), which discussed the state's ability to regulate the sales of sexually oriented materials).

[58] *Bellotti* , 443 U.S. at 638.

[59] 658 F.2d at 1073-74 (quoting *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944)).

The City argues, at least implicitly, that the traditional family unit has deteriorated in certain parts of the city and that the curfew can reverse this problem by exposing indifferent or incompetent parents to criminal liability. Rather than reaffirm parental responsibility and control over the behavior of the children, however, the Ordinance supplants the parental role with the presumed superior judgement of the state. The parent class representative that testified at trial stated that her daughter needs to learn responsibility by making her own decisions before leaving home and attending college.[60] The curfew, however, stunts this process by outlawing the juvenile's decision to engage in nocturnal activities unless the juvenile is accompanied by a parent or guardian. perhaps the paradoxical effect of the City's position is best illustrated by the City's cross-examination of one of the minor plaintiffs during trial. In response to the youth's testimony that the Ordinance would prevent her from walking the family dog at 5:30 in the morning -- one of her assigned chores -- the City questioned, "Why doesn't your mom walk your dog?"

Defendants emphasize, however, that the city contains many dysfunctional and single-parent families in dire need of assistance in controlling their children. They argue that the sanctions behind the curfew will assist these parents in keeping their children off of the streets. The city doubtless contains such families; however, "the assumption ignores the many thousands . . . of families for whom the

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[60] This Court does not pretend to be an authority on childrearing. As stated by the Supreme Court in *Bellotti* , however, "central to many . . . theories [on effective parenting], and deeply rooted in our Nation's history and tradition, is the belief that the parental rule implies a substantial measure of authority over one's children." *Bellotti* , 443 U.S. at 638.

The Court notes, however, that two private citizens who appeared as witnesses to support the Ordinance had strictly enforced 10:00 p.m. curfews for their children -- without any need for assistance or interference by the City.

ideal of family unity and parental control still lives."[61] It also ignores the fact that the Ordinance will not be enforced, except as "tool" to aid the police in keeping kids away from crack houses and breaking up gang activity. The Court is concerned that whatever benefit the Ordinance may confer on the families in need will come at the substantial expense of the majority of families that desire to raise their own children. The Court is quite hesitant to replace this sacred function with the judgment of the state.

For these reasons, the Court concludes that the *Bellotti* factors are not present in this case, and therefore, there is no reason to apply a different constitutional standard of review to the burdens imposed by the Ordinance.[62]

D. The Constitutional Validity of the Ordinance

1. Right of Association Challenge:

The right to associate is by no means absolute. The state may impose restrictions on that right if the restrictions serv a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.[63] To pass constitutional scrutiny, however, the state's regulations must be drawn with "precision,"[64] must be "tailored" to meet the compelling

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[61] *Waters*, 711 F. Supp. at 1137.

[62] *Accord Johnson*, 658 F.2d at 1073-74 (stating that "while possibly relevant to a general curfew mandate," none of the three factors applied to the overly broad restrictions imposed by the Opelousas curfew ordinance. Interestingly, the stated objectives of the Opelousas ordinance are nearly identical to those enunciated by Defendants in connection with this Ordinance: protect youths from nighttime danger; reduce nocturnal juvenile crime; and enforce parental control and responsibility for their children); *Waters*, 711 F. Supp. at 1137.

[63] *Roberts v. United States Jaycees*, 468 U.S. 623 (1983).

[64] *NAACP v. Button*, 371 U.S. 415, 483 (1963).

objective,[65] and cannot be the most restrictive approach if "less drastic means" are availbale.[66] In this case, the City has identified a compelling interest, but the application of the Ordinance will have an unnecessarily burdensome effect on the minors' fundmental associational and due process rights.

Plaintiffs concede that the City's interestin reducing juvenile crime and reducing the number of victims of juvenile crime is compelling. However, they contend that the Ordinance broadly stifles the fundamental rights of a majority of the City's minors ostensibly to reach the conduct of the few that act in violation of existing, tailored penal laws. Plaintiffs argue that the state may not restrict constitutionally protected activities in a manner that is unnecessarily broad and invasive.[67] Indeed, "even though the government purpose be legitimate and substantial that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[68]

The City responds that the Ordinance imposes only a minor burden on the rights of juveniles. It claims that the Ordinance is narrowly tailored, and aimed only at reducing incidences and victims of juvenile crime. The City argues that the Ordinance does not curtail legitimate activities, nor prohibit minors' presence in public places. Rather, it merely requires that during curfew hours, the minor be accompanied by a parent or authorized adult. Furthermore, the City stresses that the Ordinance carves out exceptions for employment activities, interstate travel, errands, emergencies, official school or

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[65] *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969).

[66] *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

[67] *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1963).

[68] *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1963) (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)).

religious activities, supervised recreational activities, and the exercise of First Amendment rights. These exceptions essentially come from two cases that the City relied on in drafting the Ordinance: *Johnson v. City of Opelousas*,[69] and *Bykofsky v. Borough of Middletown*.[70]

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[69] 658 F.2d 1065 (5th Cir. 1981). In *Johnson*, the Fifth Circuit reversed the district court's holding that the curfew ordinance at issue was constitutional . The circuit court held that the ordinance, which contained exceptions only for emergency errands and minors accompanied by their parents, was constitutionally overbroad. In its discussion, the court elaborated on several activities that the ordinance prevented:

"[A]ttending associational activities such as religious or school meetings, organized dances and theater and sporting events...being on the sidewalk in front of his house, engaging in legitimate employment, or traveling...on an interstate trip."

Id. at 1072. With the exception of organized dances, theater, and sporting events, the City included all of these activities as exceptions of the Ordinance. The exception for recreational activities could cover these events if they were sponsored by the appropriate group and supervised by adults. The Court will not speculate, however, on what the Fifth Circuit meant by "organized."

Because of the breadth of the ordinance in *Johnson*, the court did not specifically address the constitutionality of restricting minors' rights to move about the streets freely and innocently. For this reason and because of the shortcoming the exception for First Amendment activities in this Ordinance, the court finds that *Johnson* does not lead to the conclusion that the Dallas juvenile curfew is constitutional. to the contrary, its analysis and findings with respect to minors' rights under *Bellotti* lead to the opposite conclusion.

[70] 401 F. Supp. 1242 (M.D. Pa. 1975). *Bykofsky* is the only federal case to date that has upheld a curfew ordinance similar to the Ordinance. This Court declines to follow *Bykofsky*, however, for two reasons. First, the ordinance in *Bykofsky* contained several exceptions not present in the Ordinance. These include: a notice provision designed to facilitate the minors' exercise of their First Amendment rights; a "reasonable necessity" provisionthat encompasses a range of emergency situations as defined by the parent; an exception for acitivites of any "voluntary associate;" a general catch-all exception allowing the mayor to issue individual or group permits for acitivites not covered by any other exception; and authorization for the mayor to suspend the curfew if deemed necessary prior to the expiration date. *Id*. at 1247. Second, the holding *Bykofsky* that minors' rights deserve less constitutional protection than those of adults is wrong. This Court agres with the finding in Waters, 711 F. Supp. at 1136, that the *Bykofsky* court's conclusion on this point "is inseqparable from its finding that the . . . ordinance did not violate [the minors'] due process rights. . . ." The Court also agrees with the

It is what the Ordinance restricts, however, and not what it exempts that matters the most.[71] As previously discussed, the Ordinance as written prohibits a variety of protected conduct. For example, a midnight basketball league aimed solely at keeping juveniles off of the streets would violate the Ordinance unless officially organized, sponsored, and supervised by the City of Dallas, a school, a civic association, or some "other entity." The same is true for a concert, movie, play, or study group that may extend past curfew hours. Another problematic area vinvoles church activities, since some of the minor plaintiffs testified about youth group outings to amusement parks and other places. Presumably, these too would run afoul of the Ordinance short of proof that the minors were engaged in an "official religious activity." In addition, every juvenile in the city could be arrested and fined up to $500.00 upon conviction if he or she merely sought to take an innocent stroll or "gaze at the stars from a public park."[72]

The City's addition of an exception for recreational activities supervised by adults and sponsored by the City of Dallas, a civic organization, or other similar entity that takes responsibility for the minor is a valiant attempt to restrict the burdens imposed by the Ordinance. However, because of the vagueness and ambiguity inherent in the defining terms "recreational activities" and "other similar entity," this exception is unworkable from the standpoint of the minor facing arrest, the enforcing officer, and the fact finder that must determine

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conclusion in *Waters* that *Bellotti v. Baird*, 443 U.S. 622, (1979), decided several years after *Bykofsky*, requires a different conclusion on the stanrd of review for the minors' constitutional rights.

[71] *Waters*, 711 F.Supp. at 1136.

[72] *Id.*

guilt or innocence.[73]

The term recreation, which is defined as a "means of refreshment or diversion," or a "hobby,"[74] is subject to diverse interpretations, depending on the individual tastes, preferences, and practices of the person engaged i nthe activity or the perso nresponsible for making the determination. Thus, what constitutes a "recreational acitivty" is inherently subjective and vests immense discretion in each police officer responsible for making that determination in the field. Such a subjective standard presents too much opportunity for selective enforcement and infringment on protected acitivties.[75] The term "other similar entity" is even more problematic because the only guidelines seem to be that it involve some degree of adult supervision and some degree of taking responsibility for the minors. Without elaboration, it is obvious that this term could mean something new each time it is applied.

The provision allowing defense from prosecution for the exercise of First Amendment rights does not change the outcome in this case. It is plain from the City's arguments in its pleadings and at trial that the City has no intention of permitting minors to exercise their due process and associational rights to move about the City during curfew hours without an officially sanctioned purpose. As Plaintiffs point out, if the City were to observe these rights within the First Amendment exception, the Ordinance would be self-defeating because it would permit precisely the conduct it is designed to curtail. Therefore, the Court finds that the exception fails to guard properly

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[73] *See City of Maquoketa*, 484 N.W.2d 179, 185 (Iowa 1992) (finding the term "parentally approved supervised activity" vague).

[74] *Webster's Ninth New Collegiate Dictionary* (1985).

[75] For example, a brisk walk might be considered by many to be a valued recreational activity. However, should one's opinion change if the walk were taken during curfew hours, or in an urban area as opposed to the suburbs, or for personal enjoyment as opposed to health reasons?

minors' fundamental rights. The Court concludes that imposition of the Ordinance, although aimed at compelling objectives, would broadly stifle the fundamental rights of the vast majority of the City's law-abiding youths.

2. Equal Protection Challenge:

Plaintiffs claim that the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment by creating a constitutionally impermissible distinction between minors and adults. Although minors are not a suspect class, the City -- because the Ordinance infringes on fundamental rights -- is required to establish that the distinctions between minors and nonminors are narrowly tailored to serve a compelling state interest.[76] As previously discussed, the City does have compelling interests in reducing the number of crimes committed by juveniles during curfew hours and in preventing juveniles from becoming victims of crimes during the curfew.

As with most large cities, crime appears to be ever-increasing problem in Dallas *for adults and minors*. However, despite the seriousness of this problem, the City has no statistics concerning the number of juveniles that commit crimes, or that are the victims of crimes, during curfew hours. Nor did the City prove that the curfew would cause a reduction in juvenile crimes or victims. Instead, the evidence established that the Ordinance will only be enforced on a very selective basis. Accordingly, the City totally failed to establish that the Ordinance's classification between minors and nonminors is narrowly tailored to achieve the stated goals of the curfew.

the basis for the curfew

Dallas does not keep statistical information concerning either: (i) the number of minors who commit crimes in Dallas during hours, or (ii) how many Dallas children were victims of crimes

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[76] *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (citing *inter alia*, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)).

committed during the curfew. Indeed, the only factual basis for the Ordinance is that juveniles commit a significant percentage of the crimes in Dallas: 5-6%. The City merely assumes that some of this juvenile crime occurs during curfew hours. The City also assumes that because too many juveniles are victims of crime in Dallas, some must be harmed during the curfew.[77]

One City witness, Sergeant Jack Clower, testified that [sic] the Police Department "did not have the money" for the computer program necessary to generate this type of information about juvenile crimes and victims during curfew hours. Accordingly, the City attempted to supply some statistical basis for the Ordinance by a manual review of the 2,660 arrests made by the Police Department from January 1 to May 31, 1992. In this manner, the City presented evidence at the July 20, 1992 hearing that there were 494 juvenile arrests for crimes possibly committed during this five-month period (approximately 99 per month).[78]

However, this figure merely represents the number of *arrests* made during curfew hours and in public places. There are no records to show when and where the *offense* actually occurred, and the time period established by this evidence is the time the officer completed the report -- not when the arrest was made or when the offense took place. Moreover, of the supposed 494 arrests of juveniles during curfew hours [sic]: only 316 occurred in "public places," as defined by the curfew, and 60 were for runaway minors (an offense that

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[77] *This same reasoning could be used to support a curfew for 17, 18, and 19 year-old juveniles.* Similarly, although no evidence was presented concerning the number of juveniles that commit crimes or that are criminal victims during *noncurfew hours*, this same rationale -- that juveniles are involved in a significant percentage of crimes committed during daylight hours in Dallas -- would, under the City's logic, also support *a curfew for children during the day.*

[78] The City presented similar evidence at the June, 1991 hearing. The Court will review only the most recent statistics, however, because only they conform with the City's revised definition of the public place.

is outside the objective of the curfew). Thus, for the five-month period between January and May, the City has a record of only 256 arrests that occurred during curfew hours and in public places.[79] Of these, 8% (26 offenses) involved harm to another individual, either by aggravated assault or aggravated robbery.

These figures tell very little about the number of juvenile offenders and victims of crime during curfew hours. One conclusion is certain, however. The evidence is wholly inadequate to support an ordinance that promises to infringe upon the fundamental rights of most minors in the City of Dallas.

gangs and crack houses

Gang violence and drug sales, particularly "crack cocaine houses," were also offered by the City as a justification for the curfew. However, with respect to gangs, the only evidence presented to this Court was that over 54% of the gang members are 17 or over and would not be subject to the curfew.

Crack houses, without doubt, present a horrible danger to adults and children. Councilman Al Lipscomb testified that drug dealers often employ young, unsupervised children to act as lookouts for any police that might be patrolling the neighborhood. However, persons engaged in illegal drug sales or illegal gang activities -- just like those involved in other crimes the Ordinance seeks to address[80] -- already carry penalties far in excess of the $500.00 maximum fine imposed by the Ordinance. As discussed in *Waters*, it is naive, to say the least, to assume that juvenile criminals undeterred by strict criminal penalties would obey a curfew:

Logic is perhaps the most fatal to the Act's constitutionality.

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[79] Opponents of the Ordinance may well question the wisdom of a law that subjects every juvenile in Dallas to a curfew because of about 51 juvenile arrests per month.

[80] These include murder, burglary, rape, aggravated assault, robbery, arson, auto theft, and vandalism.

In order to reasonable effectuate its ends, the Act must assume that those juveniles who currently leave their homes at night to engage in drug trafficking, or to engage in other illegal, violent behavior, will be deterred from doing so by the existence of a curfew law. The naivete of such an assumption is striking. Virtually everything that the Act seeks to thwart--violence, trade in illicit narcotics--is already illegal, and carries sanctions far more painful than a night of detention.[81] Indeed, as *Waters* observes, the logical effect of the juvenile curfew is this: it likely will be heeded most by youths who already obey the law, thus taking its greatest toll upon the innocent and law abiding; and at best, it will ismply pose a minor obstacle for those whose actions are not impeded by penal codes and sanctions.

selective enforcement?

The City also argues that the Ordinance will be effective because it promises a tool unavailable under current statutes that will allow the police to accost juveniles engaged in otherwise lawful activities, and will enable them to thwart crime by making arrests for curfew violations. However, as evidenced by Chief Rathburn's testimony, the Police Department *will not* increase its manpower simply to enforce the curfew -- and the number of arrests will be very, very small. Thus, it is unlikely that the Ordinance will result in a decrease of juvenile offenses, particularly given the current budget and personnel constraints on the Dallas Police Department. The more plausible outcome is that the curfew will be enforced on a selective basis in selective high-crime areas.

For these reasons, the City has failed to meet its burden of proving that the juvenile curfew ordinance creates a distinction between minors and adults that is necessary to achieve a reduction in juvenile crime and juvenile victims of crime. The

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[81] 711 F.Supp. at 1139. As the court in *Waters* stated, "it might even be said that, 'in practical effect, the challenged classification simply does not operate so as to rationally further' the Act's express objective." *Id.*

Ordinance, therefore, cannot withstand constitutional scrutiny.

D. Texas Constitution

Plaintiffs also argue that the Ordinance violates Sections 3, 6, 8, 9, 10, 19, and 29 of the Texas Constitution. The arguments raised by Plaintiffs under the equal rights provision in section 3, the free exercise provision in section 6, and the due process clause of section 19 are essentially the same as those presented under federal law. Consequently, the Court will not repeat its analysis and discussion of these issues. Certain areas of the Texas Constitution, however, have been construed to provide more expansive individual rights than those guaranteed by the United States Constitution.[82] The Texas Supreme Court has held that the rights of free speech and press guaranteed by the Texas Constitution are more extensive than those protected under federal law.[83] In addition, Texas courts have found that the Texas Bill of Rights affords a greater right of privacy than that found in the Federal Bill of Rights.[84]

On its face, the Ordinance violates the enhanced guarantee of the free speech under the Texas Bill of Rights. Even if the Court were to give full effect to he defense in the Ordinance to "exercising First Amendment rights protected by the United States

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[82] *State of Texas v. Morales*, 826 S.W.2d 201, 203 (Crt.App. – Austin 1992, writ granted).

[83] *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 944 (Tax. [sic] 1988).

[84] *See, e.g. Morales*, 826 S.W.2d at 204-05 (finding a fundamental right of privacy under the Texas Constitution for consenting adults privately engaged in homosexual conduct); *Texas State Employees Union v. Texas Department of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tax. [sic] 1987) (finding that mandatory polygraph tests violate privacy rights protected by the Texas Bill of Rights).

Constitution,"[85] it affords no such protection for the rights secured by the Texas Constitution. Contrary to the argument presented by the City, nothing in the Ordinance prevents an officer from infringing upon a minor's right of free speech insofar as Texas's guarantees exceed deferral guarantees. Thus, the Ordinance permits interference with a fundamental liberty secured by the Texas Constitution.

In addition, the manner in which the Ordinance interferes with the parental role by dictating the parameters of permissible conduct during curfew hours may violate the zone of privacy secured by the Texas Constitution.[86] Although the boundaries of this right have not been clearly delineated by the Texas Supreme Court, it appears that the right of personal privacy under the Texas Constitution to be free from unreasonable governmental intrusion would extend to unreasonable interferences with childraising. The Texas Supreme Court has clearly recognized that the United States Constitution protects the right to make fundamental choices affecting the family,[87] and it has extended the right of privacy under the Texas Constitution to areas not protected by its federal counterpart.[88]

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[85] As discussed above, because of the defect in the application of this defense to the minors' due process and associational rights to wander freely on the City's streets, this provision does not properly guard the minors' First and Fourteenth Amendment Rights under the Federal Constitution.

[86] See, e.g. *Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation*, 746 S.W. 2d 203, 205 (Tax. [sic] 1987). The court found that the Texas Constitution, implicitly secures a right of individual privacy from "those general, great, and essential principles of liberty and free government' established by the Texas Bill of Rights." Id. (citing Tex. Const., art. I, Introduction to the Bill of Rights).

[87] *Ind. Foundation of South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 669 (Tax. [sic] 1976).

[88] *See State Emp. Union*, 746 S.W.2d at 206 (finding that the right of privacy outweighs the government's interests in submitting state employees to polygraph tests).

Furthermoe, a recent Texas Court of Appeals decision has extended the right of privacy to protect homosexual conduct between consenting adults in private.[89] Based on this precedent, this Court believes that if the Texas Supreme Court were to consider the question, it would include within the zone of privacy protected by the Texas Constitution a fundamental right of privacy to be free from unreasonable intrusion into the domain of fulfilling the parental role.[90] Moreove, this fundamental right is violated by the Ordinance.

As with federal law, when a fundamental right is implicated under the Texas Constitution, the State bears the burden of proving that the instrusion is reasonable necessary to achieve a compelling governmental objective.[91] For the same reasons discussed above concerning federal law, despite the compelling interests of reducing juvenile crime and the victims of juvenile crime, the Ordinance is not narrowly tailored to accomplish these objectives. Accordingly, the Ordinance violates the Constitution os the State of Texas.

Conclusion

The Court does not doubt that *some* Dallas juveniles are involved in crimes, drugs, and gangs during curfew hours. Nor does it doubt that *some* Dallas juveniles are the victims of violent crime during curfew. The City, however, has made no attempt to determine the nature or extent of the problem. Instead, the City rationalizes the

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[89] *Morales*, 826 F.2d at 204 (stating, "we can think of nothing more fundamentally private and deserving of protection than the sexual behavior between consenting adults in private").

[90] This question can be certified to the Texas Supreme Court by the Fifth Circuit Court of Appeals. If the Fifth Circuit finds that this decision is incorrect under the Federal Constitution, certification of this question would resovle the entire controversy without the additional time and expense of another law suit in state court.

[91] *Texas State Employees Union*, 746 S.W.2d at 205 (right to privacy); *Houston Chronicle Publishing Company v. City of Houston*, 620 S.W.2d 833, 837 (Tax. [sic] Civ. App. – Houston 1981) (right of free speech).

Ordinance with the following reasoning. Approximately 5% of the crimes committed in Dallas during all hours of the day involve juveniles. Consequently, some of the crimes committed by juveniles must have taken place at night and throughout the city. By enacting a city-wide law that is designed to keep juveniles off of the streets at night, some of these crimes will be prevented. Therefore, the curfew Ordinance is both legal and necessary.

The supporters of the Ordinance are perfectly comfortable with this reasoning. In their opinion, if the Ordinance might same the life of one child, it should be passed. Indeed, many of the supporters believe that juveniles have no business being in public during curfew hours to begin with. Without hesitation, therefore, they urge to City to do what they cannot: dictate to all minors and the parents or guardians of those minors when they can be outside and when they must be at home. And all of this is done with the best of intentions: less violence, less crime, less harm to children.

As its opponents point out, however, thousands of juveniles that are properly supervised by their parents and that do not violate law will be held under virtual house arrest. Meanwhile, the truly dangerous juveniles -- those with no regard for the law -- will continue to roam the streets *curfew or no curfew*. As the trial testimony established, the Ordinance will not be consistently or broadly enforced because of the lack of police personnel. It is to be used as a "tool" in high crime areas to combat ongoing problems, such as crack houses and gang warfare. It is [sic] be used against the handful of offenders -- possibly those without parents or without parents who care -- for which there appears no alternative. It is to be used to arrest those who are not deterred by the threat of a fine or a night in jail. Paradoxically, then, the greatest strength of the curfew -- voluntary compliance -- is its greatest weakness as well -- punishment of the innocent and law abiding. "When fundamental interests are at stake, this inversion of anticipated

effects renders [such a law] constitutionally unacceptable."[92] For these reasons, the Court hereby declares Ordinance number 21309, "*Curfew Hours for Minors*," unconstitutional, and permanently enjoins the City of Dallas from enforcing it.

SO ORDERED.

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[92] *Waters v. Barry*, 711 F. Supp. 1125, 1139 (D.D.C. 1989).

Elizabeth QUTB, Individually and as
next friend of Sabrina Qutb, et al., Plaintiffs-Appellees,

v.

Annette STRAUSS, Mayor of the City of Dallas, TX. et al.,
Defendants,

v.

Steve BARTLETT, Mayor of the City of Dallas, TX, et al.,
Defendants-Appellants.
No. 92-1707.

United States Court of Appeals,
Fifth Circuit.
Nov. 19, 1993.

Appeal from the United States District Court for the Northern District of Texas.

Before KING and JOLLY, Circuit Judges, and PARKER, District Judge.*

E. GRADY JOLLY, Circuit Judge:

This appeal presents a challenge to the constitutionality of nocturnal juvenile curfew ordinance enacted by Dallas, Texas. The ordinance makes it a misdemeanor for persons under the age of seventeen to use the city streets or to be present at other public places within the city between certain hours. [1] Several plaintiffs brought suit against the city to strike down the ordinance. The district court ruled

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[1] A copy of the ordinance is attached. All references to the ordinance concern the ordinance as it was amended in June 1992, unless otherwise stated.

for the plaintiffs, holding that the ordinance violated both the United States and the Texas Constitutions, and permanently enjoined enforcement of the ordinance. The city appeals. Because we conclude that this ordinance does not violate the United States or Texas Constitutions, we reverse the district court.

I.

On June 12, 1991, in response to citizens' demands for protection of the city's youth, the Dallas City Council enacted a juvenile curfew ordinance. This ordinance prohibits persons under seventeen years of age[2] from remaining in a public place or establishment from 11 p.m. until 6 a.m. on week nights, and from 12 midnight until 6 a.m. on weekends. As defined by the ordinance, a "public place" is any place to which the public or a substantial group of the public has access, and includes streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops. "Establishment" is defined as "any privately-owned place of business operated for a profit to which the public is invited, including but not limited to any place of amusement or entertainment."

Although the ordinance restricts the hours when minors are allowed in public areas, the ordinance also contains a number of exceptions, or defenses. A person under the age of seventeen in a public place during curfew hours does not violate the ordinance if he or she is accompanied by a parent[3] or guardian, or is on an errand for a parent or guardian. Likewise, minors would be allowed in public

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[2] The ordinance does not apply to persons under the age of seventeen who are married, or who have been married, or who have had the disability of minority removed in accordance with Chapter 31 of the Texas Family Code.

[3] Under the ordinance, the definition of "parent" includes a person who is "a natural parent, adoptive parent, or step-parent of another person" and those persons who are "at least 18 years of age and authorized by a parent or guardian to have care and custody of a minor."

places if they are in a motor vehicle travelling to or from a place of employment, or if they are involved in employment related activities. Affected minors could attend school, religious, or civic organizational functions--or generally exercise their First Amendment speech and associational rights--without violating the ordinance. Nor is it a violation to engage in interstate travel, or remain on a sidewalk in front of the minor's home, or the home of a neighbor. And finally, the ordinance places no restrictions on a minor's ability to move about during curfew hours in the case of an emergency.

A minor violates the curfew is he or she remains in any public place or on the premises of any establishment during curfew hours, and if the minors' activities are not exempted from coverage. If a minor is apparently violating the ordinance, the ordinance requires police officers to ask the age of the apparent offender, and to inquire into the reasons for being in a public place during curfew hours before taking any enforcement action. An officer may issue a citation or arrest the apparent offender only if the officer reasonably believes that the person has violated the ordinance and that no defenses apply. If convicted, an offending party is subject to a fine not to exceed $500.00 for each separate offense.

Like minors who have violated the offense, a parent of a minor, or an owner, operator, or employee of a business establishment is also subject to a fine not to exceed $500 for each separate offense. A parent or guardian of a minor violates the ordinance if he or she knowingly permits, or by insufficient control allows, a minor child to remain in any public place or on the premises of any establishment during curfew hours. An owner, operator, or employee of a business establishment commits an offense by knowingly allowing a minor to remain upon the premises of the establishment during curfew hours.

II.

On July 3, 1991, two weeks after the ordinance was enacted, Elizabeth Qutb and three other parents filed suit--both individually and as next friends of their teenage children--seeking a temporary restraining order and a permanent injunction against the enforcement of the juvenile curfew ordinance on the basis that the ordinance is

unconstitutional.[4] The district court certified the plaintiffs as a class that consisted of two subclasses: persons under the age of seventeen, and parents of persons under the age of seventeen. One week later, the court advanced the trial on the merits, and consolidated the trial with the hearing on the plaintiffs' request for temporary and permanent injunctions. The case was tried on July 22-23, and the district court denied the plaintiffs' request for a temporary injunction. The city, however, voluntarily delayed enforcement of the curfew pending the district court's decision on the merits.

On June 12, 1992, before the district court issued its final order on the merits of the case, the city voluntarily amended the curfew ordinance. The amended ordinance deleted or altered some of the provisions of which the plaintiffs complained, while expanding some of the defenses available to affected minors. In response to the revised ordinance, the plaintiffs filed an amended complaint and an amended motion for a permanent injunction against enforcement of the curfew. The district court held a second evidentiary hearing, where both parties presented additional evidence and arguments concerning validity of the revised ordinance under the United States and Texas constitutions. On August 10, 1992, the district court held that the curfew impermissibly restricted minors' First Amendment right to associate, and that it created classifications that could not withstand constitutional scrutiny.[5]

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[4] Before the district court, the plaintiffs asserted several grounds for holding the ordinance unconstitutional. first, they argued that the ordinance impermissibly restricts First Amendment rights of free speech and free association. They also contended that the ordinance violates the Fourth and fourteenth amendment right against unreasonable searches and seizures, and that the ordinance divests them of their Fifth and Fourteenth amendment rights to a presumption of innocence, proof beyond a reasonable doubt, and freedom against self-incrimination. Plaintiffs further maintained that the ordinance violates the equal protection clause, and implicates fundamental liberty and privacy interests protected by the due process clause of the Fourteenth Amendment. Finally, plaintiffs argued that the ordinance is vague and overly broad.

[5] Because the district court held the ordinance unconstitutional on the equal protection and free association grounds, the district court did not reach the other arguments presented by the plaintiffs.

Accordingly, the district court permanently enjoined enforcement of the curfew, and the city now appeals.

III.

A.

[1,2] We review de novo the district court's conclusions of constitutional law. *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1213 (5th Cir. 1991); *Shillingford v. Holmes*, 634 F.2d 263, 266 (5th Cir. 1981). The minor plaintiffs argue, inter alia, that the curfew ordinance violates the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). Only if the challenged government action classifies or distinguishes between two or more relevant groups must we conduct an equal protection inquiry. *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988). Here, it is clear that the curfew ordinance distinguishes between classes of individuals on the basis on age, treating those persons under the age of seventeen differently from those persons age seventeen and older. Because the curfew ordinance distinguishes between two groups, we must analyze the curfew ordinance under the Equal Protection Clause.

[3,4] Under the Equal Protection analysis, we apply different standards of review depending upon the right or classification involved. If a classification disadvantages a "suspect class" or impinges upon a "fundamental right," the ordinance is subject to strict scrutiny. *Plyler v.Doe*, 457 U.S. 202, 216-17, 102 S.Ct. 2382, 2394-95, 72 L.Ed.2d 786 (1982). Under the strict scrutiny standard, we accord the classification no presumption of constitutionality. *Town of Ball v. Rapides Parish Police Jury*, 746 F.d 1049, 1059 (5th Cir. 1984). Instead, we ask whether the classification promotes a compelling governmental interest, and, if so, whether the ordinance is narrowly tailored such that there are no less restrictive means available to effectuate the desired end. *Pugh v. Rainwater*, 557 F.2d 1189, 1195 (5th Cir. 1977), vacated on other grounds, 572 F.2d 1053 (5th Cir.

1978).

In this case, no one has argued, and correctly so, that a classification based on age is a suspect classification. See *Gregory v. Ashcroft*, --- U.S. ---, ---, 111 S.Ct. 2395, 2406, 115 L.Ed2d 410 (1991) (holding that age is not a suspect class). The minor plaintiffs, however, have argued that the curfew ordinance impinges upon their "fundamental right" to move about freely in public. For purposes of our analysis, we assume without deciding that the right to move about freely is a fundamental right. We are mindful, however, that this ordinance is directed solely at the activities of juveniles and, under certain circumstances, minors may be treated differently from adults.[6]

B.

[5] Because we assume that the curfew impinges upon a fundamental right, we will now subject the ordinance to strict scrutiny review. As stated earlier, to survive strict scrutiny, a classification created by the ordinance must promote a compelling governmental interest, and it must be narrowly tailored to achieve this interest. *Plyler v. Doe*, 457 U.S. at 216-17, 102 S.Ct. at 2394-95. The city's stated interest in enacting the ordinance is to reduce juvenile crime and victimization, while promoting juvenile safety and well-being. The Supreme Court has recognized that the state "has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Hodgson v. Minnesota*, 497 U.S. 417, 444, 110 S.Ct. 2926, 2942, 111 L.Ed.2d 344 (1990). In

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[6] In *Bellotti v. Baird*, the Court recognized that there were three reasons that allows a court to treat the rights of minors differently from rights of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing. *Belloti v. Baird*, 443 U.S. 622, 634, 99 S.Ct. 3035 at 3043, 61 L.Ed.2d 797. This analysis affects the balancing between of the state's interest against the interests of the minor when determining whether the state's interest in compelling. However, given the fact that the parties and the district court all agree that the interest of the state in this instance is compelling, it is unnecessary to conduct a full *Belloti* analysis.

this case, the plaintiffs concede and the district court held that the state's interest in this case is compelling. Given the fact that the state's interest is elevated by the minority status of the affected persons, we have no difficulty agreeing with the parties and with the district court.

C.

In the light of the state's compelling interest in increasing juvenile safety and decreasing juvenile crime, we must now determine whether the curfew ordinance is narrowly tailored to achieve that interest. The district court held that the city "totally failed to establish that the Ordinance's classification between minors and non-minors is narrowly tailored to achieve the stated goals of the curfew." We disagree.

[6] To be narrowly tailored, there must be a nexus between the stated government interest and the classification created by the ordinance. *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 721, 102 L.Ed.2d 854 (1989). This test "ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate ...." *Id.*

The articulated purpose of the curfew ordinance enacted by the City of Dallas is to protect juveniles from harm, and to reduce juvenile crime and violence occurring in the city. The ordinance's distinction based upon age furthers these objectives. Before the district court, the city presented the following statistical information:

1. Juvenile crime increases proportionally with age between ten years old and sixteen years old.
2. In 1989, Dallas recorded 5,160 juvenile arrests, while in 1990 there were juvenile arrests. In 1990 there were forty murders, ninety-one sex offenses, 233 robberies, and 230 aggravated assaults committed by juveniles. From January 1991 through April 1991, juveniles were arrested for twenty-one murders, thirty sex offenses, 128 robberies, 107 aggravated assaults, and 1,042 crimes against property.

3. Murders are most likely to occur between 10:00 p.m. and 1:00 a.m. and most likely to occur in apartments and apartment parking lots and streets and highways.
4. Aggravated assaults are most likely to occur between 11:00 p.m. and 1:00 a.m.
5. Rapes are most likely to occur between 1:00 a.m. and 3:00 a.m. and sixteen percent of rapes occur on public streets and highways.
6. Thirty-one percent of robberies occur on streets and highways.

Although the city was unable to provide precise data concerning the number of juveniles who commit crimes during the curfew hours, or the number of juvenile victims of crimes committed during the curfew, the city nonetheless provided sufficient data to demonstrate that the classification created by the ordinance "fits" the state's compelling interest.[7]

Furthermore, we are convinced that this curfew ordinance also employs the least restrictive means of accomplishing its goals. The ordinance contains various "defenses" that allow affected minors to remain in public areas during curfew hours. Although the district court concluded that "[i]t is what the Ordinance restricts . . . and not what it exempts that matters the most," it is clear to us that neither the restrictions of the curfew ordinance nor its defenses can be viewed in

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[7] Plaintiffs argue that because the city failed to offer statistical evidence supporting the nocturnal juvenile crime problem, the city failed to meet its burden of proving the necessary "fit" between the compelling state interest and the curfew. we will not, however, insists upon detailed studies of the precise severity, nature, and characteristics of the juvenile crime problem in analyzing whether the ordinance meets constitutional muster when it is conceded that the juvenile crime problem in Dallas constitutes a compelling state interest. In this same vein, the plaintiffs arguments that the city has not produced proof of the effectiveness of he ordinance in addressing the juvenile crime problem are unavailing; indeed, such "proof" can hardly amount to more than mere speculation. Federal courts have always been reluctant to questions the potential effectiveness of legislative remedies designed to address societal problems. As we have held in other contexts, we "do not demand of legislatures scientifically certain criteria of legislation." *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 1282, 20 L.Ed.2d 195 (1968) (internal quotes omitted).

isolation from each other; the ordinance can be examined fairly only when the defenses are considered as a part of the whole. To be sure, the defenses are the most important consideration in determining whether this ordinance is narrowly tailored.

In the past, curfew ordinances have been held unconstitutional because of their broad general applications. In *Johnson v. City of Opelousas*, for example, we addressed a juvenile curfew ordinance and declared it unconstitutional; our holding, however, was "expressly limited to the unconstitutional over-breadth of the ordinance." *Johnson v. City of Opelousas*, 658 F.2d 1065, 1074 (5th Cir. 1981). Furthermore, we stated that "[w]e express no opinion on validity of curfew ordinances narrowly drawn to accomplish proper social objectives." *Id.* at 1072. In declaring the *Johnson* ordinance to be an undue burden on the rights of minors, we noted that:

[U]nder this curfew ordinance minors are prohibited from attending associational activities such as religious or school meetings, organized dances, and theater and sporting events, when reasonable and direct travel to or from these activities has to be made during the curfew period. The same inhibition prohibits parents from urging and consenting to such protected associational activity by their minor children. The curfew ordinance also prohibits a minor during the curfew period from, for example, being on the sidewalk in front of his house, engaging in legitimate employment, or traveling through [the city] even on an interstate trip. These implicit prohibitions of the curfew ordinance overtly and manifestly infringe upon the constitutional rights of minors in [the city].

Id. We therefore concluded that the "curfew ordinance, however valid might be a narrowly drawn curfew to protect society's valid interests, [swept] within its ambit a number of innocent activities which are constitutionally protected." *Id.* at 1074 (emphasis added). In *Johnson*, we further stated that:

[r]egardless of the legitimacy of [the city's] stated purposes of protecting youths, reducing nocturnal juvenile crime, and promoting parental control over their children, less drastic

means are available for achieving these goals. Since the absence of exceptions in the curfew ordinance precludes a narrowing construction, we are compelled to rule that the ordinance is constitutionally overbroad.

Id. (emphasis added).

With the ordinance before us today, the City of Dallas has created a nocturnal juvenile curfew that satisfies strict scrutiny. By including the defenses to a violation of the ordinance, the city has enacted a narrowly drawn ordinance that allows the city to meet its stated goals[8] while respecting the rights of the affected minors. As the city points out, a juvenile may move about freely in Dallas if accompanied by a parent or a guardian, or a person at least eighteen years of age who is authorized by a parent or guardian to have custody of the minor. If the juvenile is traveling interstate, returning from a school-sponsored function, a civic organization-sponsored function, or a religious function, or going home after work, the ordinance does not apply.

Against the ordinance's an expansive list of defenses, the district court attempted to provide examples of activities with which the curfew ordinance would interfere. The district court suggested the example of "a midnight basketball league aimed solely at keeping juveniles off of the streets" to demonstrate that participation in

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[8] According to the city, its goals in enacting the ordinance are to (1) reduce the number of juvenile crime victims; (2) reduce injury accidents involving juveniles; (3) reduce additional time for officers in the field; (4) provide additional options for dealing with gang problems; (5) reduce juvenile peer pressure to stay out late; and (6) assist parents in the control of their children. The aim of the ordinance is to deter criminal conduct involving juveniles as well as penalize those individuals who violate it. However, the city states that its intent is not to penalize every youth found in public during curfew hours, but to use the ordinance as a tool to help address other criminal activity problems that involve or may potentially involve juveniles. The curfew ordinance provides an officer with reasonable suspicion to approach gangs to determine if any of them are juveniles. According to the city, the curfew ordinance can help address Dallas's gang problem because gang members often congregate in public and set up an environment where criminal activities take place, such as drive-by shootings, fights, and "turf" disputes.

legitimate desirable activities would violate the ordinance unless the activities were officially organized, sponsored, or supervised by the city, a school, a civic association, or some "other entity." In its effort to demonstrate that the ordinance was overly broad, the district court referred to concerts, movies, plays, study groups, or church activities that may extend past curfew hours. The district court finally noted that "every juvenile in the city could be arrested and fined up to $500.00 upon conviction if he or she merely sought to take an innocent stroll or 'gaze at the stars from a public park.'"

With due respect to the able district court, we are convinced that upon examination, its analysis collapses. It is true, of course, that the curfew ordinance would restrict some late-night activities of juveniles; if indeed it did not, then there would be no purpose in enacting it. But when balanced with the compelling interest sought to be addressed -- protecting juveniles and preventing juvenile crime -- the impositions are minor. The district court failed to observe that none of the activities it listed are restricted if the juvenile is accompanied by a parent or a guardian. Even if the child is unaccompanied by a parent or a guardian, we can presume that most events such as a "midnight basketball league" or a church youth group outing ordinarily would be organized, sponsored or supervised by an adult or an organization, and these are exceptions to the curfew. Although it is true that in some situations unaccompanied juveniles may be forced to attend early evening features of a movie or leave a play or concert before its conclusions, this imposition is ameliorated by several of the ordinance's defenses so that the juvenile is not deprived of actually attending such cultural and entertainment opportunities. Furthermore, a juvenile can take an "innocent stroll" and stare at the stars until 11:00 on week-nights and until 12:00 midnight on weekends; indeed, a juvenile may stare at the stars all night long from the front sidewalk of his or her home or the home of a neighbor. Thus, after carefully examining the juvenile curfew ordinance enacted by the City of Dallas, we conclude that it is narrowly tailored to address the city's compelling interest and any burden this ordinance places upon minors' constitutional rights will

be minimal.[9]

D.

[7,8] In addition to the claims presented by the minor plaintiffs, the parental plaintiffs argue that the curfew ordinance violates their fundamental right of privacy because it dictates the manner in which their children must be raised. although we recognize that a parent's right to rear their children without undue governmental interference is a fundamental component of due process, see, e.g., *Ginsberg v. New York*, 390 U.S. at 639, 88 S.Ct. at 1279, we are convinced that his ordinance presents only a minimal intrusion into the parents' rights. In fact, the only aspect of parenting that this ordinance bears upon is the parents' right to allow the minor to remain in public places, unaccompanied by a parent or guardian or other authorized person, during the hours restricted by the curfew ordinance. Because of the broad exemptions included in the curfew ordinance, the parent retains the right to make decisions regarding his or her child in all other areas: the parent may allow the minor to remain in public so long as the minor is accompanied by a parent or guardian, or a person at least eighteen years of age who is authorized by a parent or guardian to have custody of the minor. The parent may allow the minor to attend all activities organized by groups such as church groups, civic

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[9] The minor plaintiffs argued and the district court held that the minors' first amendment rights of association are also impermissibly impinged upon by the curfew ordinance. We disagree. First, it is questionable whether a fundamental right of association is implicated. The Supreme Court has held that there is no "generalized right of social association," *Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989) (internal quotes omitted), and, that seems to be precisely the type of association we are primarily concerned with in this case. Even in those instances when minors may, for example, associate for political or religious reasons, the majority of those situations will be exempted under one of the defenses to the curfew ordinance. In any event, we have determined that this curfew ordinance satisfies strict scrutiny, and any negligible burden on the individual's right to associate is outweighed by the compelling interests of the state. we have also considered the minor plaintiffs' Equal Protection argument in the light of the Texas constitution. We find nothing and we have been pointed to no authority -- other than an unrelated defamation case -- that warrants a different treatment of this issue under the state constitution.

organizations, schools, or the City of Dallas. The parent may still allow the child to hold a job, to perform an errand for the parent, and to seek help in emergency situations.

In this case, the parents have failed to convince us that the ordinance will impermissibly impinge on their rights as parents. The parents' only "evidence" to support their argument is the testimony of the mother of one of the plaintiffs that her daughter would soon be going to college, and the curfew ordinance -- applying only between 11 p.m. and 6 a.m. -- would somehow deprive her daughter of the opportunity to learn to manage her time and make decisions before going away to college. certainly this testimony is insufficient to support the district court's finding that the ordinance unconstitutionally infringed the liberty and privacy interest of parents.[10]

IV.

In conclusion, we find that the state has demonstrated that the curfew ordinance furthers a compelling state interest, *i.e.*, protecting juveniles from crime on the streets. We further conclude that the ordinance is narrowly tailored to achieve this compelling state interest.[11] Accordingly, we hold that the nocturnal juvenile curfew ordinance enacted by the City of Dallas is constitutional. The judgment of the district court is therefore

REVERSED.

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[10] The parents also assert that the curfew ordinance is unconstitutional under the Texas constitution based on an invasion of parental privacy. We recognize that the Texas courts have construed the Equal Protection Clause of the Texas Constitution more expansively than that of the United States constitution in the area of homosexual rights. *See State v. Morales*, 826 S.W.2d 201, 204 (Tex.App. – Austin, 1992, error granted). We were unable, however, to find any authority that supports the notion that the Texas constitution would provide more protection in the area of parental privacy.

[11] We can also envision the constitutionality of a narrowly drawn nocturnal juvenile curfew ordinance that applies only in a municipality's high risk, high crime areas or danger zones.

KING, Circuit Judge, specially concurring:

I concur in the result reached by the majority without expressing a view on the method by which the majority has reached that result.

APPENDIX C

PARTIAL LIST OF CITIES THAT HAVE ENACTED CURFEW ORDINANCES

Athens, Alabama

Birmingham, Alabama

Montgomery, Alabama

Selma, Alabama

Brinkley, Arkansas

Camden, Arkansas

Conway, Arkansas

Earle, Arkansas

Forrest City, Arkansas

Fort Smith, Arkansas

Helena, Arkansas

Jacksonville, Arkansas

Little Rock, Arkansas

Lonoke, Arkansas

Marianna, Arkansas

Maumelle, Arkansas

North Little Rock, Arkansas

Pine Bluff, Arkansas

Searcy, Arkansas

Sherwood, Arkansas

Stuttgart, Arkansas

Summit, Arkansas

Texarkana, Arkansas

West Helena, Arkansas

West Memphis, Arkansas

Maryvale, Arizona

Mesa, Arizona

Phoenix, Arizona

Long Beach, California

Los Angeles, California

Oakland, California	Santa Clarita, California
Aurora, Colorado	Boulder, Colorado
Colorado Springs, Colorado	Longmont, Colorado
Hartford, Connecticut	Washington, D.C.
Wilmington, Delaware	Fort Lauderdale, Florida
Miami, Florida	Tampa, Florida
Clermont, Florida	Umatilla, Florida
Atlantic Beach, Florida	Covington, Florida
Fort Meade, Florida	Groveland, Florida
Howey-In-The-Hills, Florida	Mascotte, Florida
Minneola, Florida	Montverde, Florida
Orlando, Florida	Pine Hills, Florida
Tallahassee, Florida	Atlanta, Georgia
Augusta, Georgia	East Point, Georgia
Jesup, Georgia	Pine Lake, Georgia
Savannah, Georgia	Davenport, Iowa
Des Moines, Iowa	Panora, Iowa
Idaho Falls, Idaho	Antioch, Illinois
Chicago, Illinois	Deerfield, Illinois

Highland Park, Illinois

Highwood, Illinois

Lake Forest, Illinois

Libertyville, Illinois

Lincolnshire, Illinois

Round Lake, Illinois

Louisville, Kentucky

Shreveport, Louisiana

Boston, Massachusetts

Baltimore, Maryland

Belfast, Maine

Detroit, Michigan

Ballwin, Missouri

Bel-Nor, Missouri

Bella Villa, Missouri

Bellfontaine, Missouri

Belridge, Missouri

Belton, Missouri

Berkeley, Missouri

Black Jack, Missouri

Calverton Park, Missouri

Chesterfield, Missouri

Clayton, Missouri

Cool Valley, Missouri

Country Club Hills, Missouri

Crestwood, Missouri

Dellwood, Missouri

Des Peres, Missouri

Edmundson, Missouri

Ellisville, Missouri

Eureka, Missouri

Fenton, Missouri

Ferguson, Missouri

Florissant Hills, Missouri

Frontenac, Missouri

Grandview, Missouri

Hanley Hills, Missouri

Hazelwood, Missouri

Independence, Missouri	Kirkwood, Missouri
Ladue, Missouri	Manchester, Missouri
Maplewood, Missouri	Marbourough, Missouri
Maryland Heights, Missouri	Normandy, Missouri
Norwood, Missouri	Ollivette, Missouri
Overland, Missouri	Pacific, Missouri
Pagedale, Missouri	Pasadena Hills, Missouri
Pine Lawn, Missouri	Richmond Heights, Missouri
Riverview, Missouri	Shrewsbury, Missouri
St. John, Missouri	St. Louis City, Missouri
Sunset Hills, Missouri	Town and Country, Missouri
University City, Missouri	Valley Park, Missouri
Vinita Park, Missouri	Webster Groves, Missouri
Wellston, Missouri	Westport, Missouri
Winchester, Missouri	Woodson Terrace, Missouri
Gautier, Mississippi	Grand Island, Nebraska
Keene, New Hampshire	Camden, New Jersey
Newark, New Jersey	Paterson, New Jersey
Trenton, New Jersey	Rio Rancho, New Mexico

Long Island, New York

Yonkers, New York

Philadelphia, Pennsylvania

Swissvale, Pennsylvania

Clarendon, South Carolina

Bridgeton, Tennessee

Clarkson Valley, Tennessee

Franklin, Tennessee

Johnson City Tennessee

Knoxville, Tennessee

Shelby County, Tennessee

Austin, Texas

Bishop, Texas

Dallas, Texas

Frost, Texas

Houston, Texas

Killeen, Texas

Lockhart, Texas

Paris, Texas

Port Washington North, New York

Braddock, Pennsylvania

Rankin, Pennsylvania

Wilkinsburg, Pennsylvania

Saluda, South Carolina

Chattanooga, Tennessee

Flordell Hills, Tennessee

Hendersonville, Tennessee

Kingport, Tennessee

Nashville, Tennessee

Amarillo, Texas

Belton, Texas

Corpus Christi, Texas

El Paso, Texas

Galveston, Texas

Humble, Texas

Kingsville, Texas

Lubbock, Texas

Pasadena, Texas

Pearsal, Texas

Richmond, Texas

Tyler, Texas

Wichita Falls, Texas

Quantico, Virginia

Centalia, Washington

Raymond, Washington

Seattle, Washington

Pharr, Texas

San Antonio, Texas

Wharton, Texas

Manassas, Virginia

Bellingham, Washington

Clarkston, Washington

Toppenish, Washington

CITY OF DALLAS CURFEW ORDINANCE

WHEREAS, the City Council has determined that there has been an increase in juvenile violence, juvenile gang activity, and crime by persons under the age of 17 in the city of Dallas; and

WHEREAS, persons under the age of 17 are particularly susceptible by their lack of maturity and experience to participate in unlawful and gang-related activities and to be victims of older perpetrators of crime; and

WHEREAS, the city of Dallas has an obligation to provide for the protection of minors from each other and from other persons, for the enforcement of parental control over and responsibility for children, for the protection of the general public, and for the reduction of the incidence of juvenile criminal activities; and

WHEREAS, a curfew for those under the age of 17 will be in the interest of the public health, safety, and general welfare and will help to attain the foregoing objectives and to diminish the undesirable impact of such conduct on the citizens of the city of Dallas; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Section 31-33, "Curfew Hours for Minors," of CHAPTER 31, "OFFENSES - MISCELLANEOUS," of the Dallas City Code, as amended, is amended to read as follows:

"SEC. 31-33. CURFEW HOURS FOR MINORS.

(a) Definitions. In this section:

CURFEW HOURS means:

(A) 11:00 p.m. on any Sunday, Monday, Tuesday, Wednesday, or Thursday until 6:00 a.m. of the following day; and

(B) 12:01 a.m. until 5:00 a.m. on any Saturday or Sunday.

(2) EMERGENCY means an unforeseen combination of circumstances or the resulting state that calls for immediate action. The term includes, but is not limited to, a fire, a natural disaster, an automobile accident, or any situation requiring immediate action to prevent serious bodily injury or loss of life.

(3) ESTABLISHMENT means any privately-owned place of business operated for a profit to which the public is invited, including but not limited to any place of amusement or entertainment.

(4) GUARDIAN means:

(A) a person who, under court order, is the guardian of the person of a minor; or

(B) a public or private agency with whom a minor has been placed by a court.

(5) MINOR means any person under 17 years of age.

(6) OPERATOR means any individual, firm, association, partnership, or corporation operating, managing, or conducting any establishment. The term includes the members or partners of an association or partnership and the officers of a corporation.

(7) PARENT means a person who is:

(A) a natural parent, adoptive parent,or step-parent of another person; or

(B) at least 18 years of age and authorized by a parent or guardian to have the care and custody of a minor.

(8) PUBLIC PLACE means any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

(9) REMAIN means to:

(A) linger or stay; or

(B) fail to leave premises when requested to do so by a police officer or the owner, operator, or other person in control of the premises.

(10) SERIOUS BODILY INJURY means bodily injury that creates a substantial risk of death or that causes death, serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

(b) Offenses.

(1) A minor commits an offense if he remains in any public place or on the premises of any establishment within the city

during curfew hours.

(2) A parent or guardian of a minor commits an offense if he knowingly permits, or by insufficient control allows, the minor to remain in any public place or on the premises of any establishment within the city during curfew hours.

(3) The owner, operator, or any employee of an establishment commits an offense if he knowingly allows a minor to remain upon the premises of the establishment during curfew hours.

(c) Defenses.

(1) It is a defense to prosection under Subsection (b) that the minor was:

(A) accompanied by the minor's parent or guardian;

(B) on an errand at the direction of the minor's parent or guardian, without any detour or stop;

(C) in a motor vehicle involved in interstate travel;

(D) engaged in an employment activity, or going to or returning home from an employment activity, without any detour or stop;

(E) involved in an emergency;

(F) on the sidewalk abutting the minor's residence or abutting the residence of a next-door neighbor if the neighbor did not complain to the police department about the minor's presence;

(G) attending an official school, religious, or other recreational activity supervised by adults and sponsored by the city of Dallas, a civic organization, or another similar entity that takes responsibility for the manor, or going to or returning home from, without any detour or stop, an official school, religious, or other recreational activity supervised by adults and sponsored by the city of Dallas, a civic organization, or another similar entity that takes responsibility for the minor;

(H) exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech, and the right of assembly; or

(I) married or had been married or had disabilities of minority removed in accordance with Chapter 31 of the Texas Family Code.

(2) It is a defense to prosecution under Subsection (b)(3) that the owner, operator, or employee of an establishment promptly notified the police department that a minor was present on the premises of the establishment during the curfew hours and refused to leave.

(d) Enforcement.

Before taking any enforcement action under this section, a police officer shall ask the apparent offender's age and reason for being in the public place. The officer shall not issue a citation or make an arrest under this section unless the officer reasonably believes that the offense has occurred and that, based on any response and other circumstances, no defense in Subsection (c) is present.

(e) Penalties.

(1) A person who violates a provision of this chapter is guilty of a separate offense for each day or part of a day during which the violation is committee, continued, or permitted. Each offense, upon conviction, is punishable by a fine not to exceed $500.

(2) When required by Section 51.08 of the Texas Family Code, as amended, the municipal court shall waive original jurisdiction over a minor who violates Subsection (b)(1) of this section and shall refer the minor to juvenile court.

Supreme Court, U.S.
FILED
MAY - 6 1994
OFFICE OF THE CLERK

No. 93-1571

In The

Supreme Court of the United States

October Term, 1993

ELIZABETH QUTB, et al.,

Petitioners,

vs.

STEVE BARTLETT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fifth Circuit apply the correct legal standard in holding that the City of Dallas' juvenile curfew ordinance did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and was narrowly tailored to achieve the compelling state interest of reducing juvenile crime and victimization?

2. Did the United States Court of Appeals for the Fifth Circuit apply the correct legal standard in holding that the Dallas juvenile curfew ordinance did not violate any First Amendment right of association?

3. Did the United States Court of Appeals for the Fifth Circuit apply the correct legal standard in holding that the Dallas juvenile curfew ordinance did not violate any fundamental right to privacy?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

JURISDICTION 2

STATEMENT OF THE CASE 2

A. COURSE OF PROCEEDINGS AND DISPOSITION 2

B. STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 5

ARGUMENTS SUPPORTING DENIAL OF THE WRIT 6

I. THE STANDARDS FOR REVIEW HAVE NOT BEEN MET BY PETITIONERS 6

II. THE CITY OF DALLAS' TEEN CURFEW ORDINANCE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 9

III. THE CITY OF DALLAS' TEEN CURFEW ORDINANCE DOES NOT VIOLATE ANY GENERALIZED RIGHT OF SOCIAL ASSOCIATION 13

IV. THE CITY OF DALLAS' TEEN CURFEW ORDINANCE DOES NOT VIOLATE ANY FUNDAMENTAL RIGHT TO PRIVACY 14

V. THERE IS NO ISSUE OF PRIOR RESTRAINT IN THIS CASE 14

TABLE OF CONTENTS – Continued

Page

VI. COURTS HAVE CONSISTENTLY UPHELD ORDINANCES THAT ARE NARROWLY TAILORED 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

A. CASES

Allen v. City of Bordentown, 524 A.2d 478 (Super. Ct. N.J. 1987) 16

Alves v. Justice Ct. of Chico Judicial Dist., 306 P.2d 601 (Ct. App. Cal. 1957) 16

Braxton v. U.S., 500 U.S. ___, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991) 7

Brown v. Ashton, 611 A.2d 599 (Md. 1992) 16

Bykofsky v. Borough of Middletown, 401 F.Supp. 1242 (M.D. Penn. 1975), *aff'd*, 535 F.2d 1245 (3rd Cir. 1976), *cert. denied*, 429 U.S. 964 ..... 8, 15

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 9

City of Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992) 16

City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988) 16

City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989) 15

City of Richmond v. Croson, 488 U.S. 469 (1989) 11

City of Seattle v. Pullman, 514 P.2d 1059 (Wash. 1973) 17

City of Wadsworth v. Owens, 536 N.E.2d 67 (Wadsworth Mun. Ct. Ohio 1987) 16

Dunnigan v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983) 12

Ginsberg v. New York, 390 U.S. 629 (1968) 12

TABLE OF AUTHORITIES – Continued

Page(s)

Gregory v. Ashcroft, 111 S.Ct. 2395 (1991) 10

Hayes v. Mun. Court of Oklahoma City, 487 P.2d 974 (Ct. Crim. App. Okla. 1971) 16

Hodgson v. Minnesota, 497 U.S. 417 (1990) 10

In re Doe, 513 P.2d 1385 (Ha. 1973)..... 16

Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981).....7, 8, 9, 16

K.L.J. v. State, 581 So.2d 920 (Fla. App. [1st Dist.] 1991)..... 17

McCollester v. City of Keene, 586 F.Supp. 1381 (D.N.H. 1984) 17

Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931) 15

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 10

People in Interest of J.M., 768 P.2d 219 (Colo. 1989) 15

People v. Walton, 161 P.2d 498 (Cal. 1945)..... 15

Plyler v. Doe, 457 U.S. 202 (1982)..... 10

Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993)..... *passim*

Stanglin v. City of Dallas, 490 U.S. 19 (1989)..... 13

Thistlewood v. Ocean City, 204 A.2d 688 (Md. 1964)..... 16

Village of Deerfield v. Greenberg, 550 N.E. 2d 12 (Ill. 1990)..... 16

W.J.W. v. State, 356 So.2d 48 (Fla. App. [1st Dist.] 1978)..... 17

Waters v. Barry, 711 F.Supp. 1125 (D.D.C. 1989)..... 16

TABLE OF AUTHORITIES – Continued

Page(s)

B. STATUTES AND RULES

28 U.S.C. § 1254(1) 2

SUP. CT. R. 10.1(a) and (c) 5, 6, 7, 8

No. 93-1571

In The

Supreme Court of the United States

October Term, 1993

ELIZABETH QUTB, et al.,

Petitioners,

vs.

STEVE BARTLETT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents Bartlett, Lipscomb, Luna, Garcia, Tandy, Duncan, Hicks, Nash, Mayes, Box, Halstead, Fielding, Wells, Bartos, Palmer, Hart, Rathburn, and the City of Dallas file this Brief in Opposition to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Response"), asking the Court to deny the Petition for Writ of Certiorari ("Petition") to review the opinion issued November 19, 1993, by the United States Court of Appeals for the Fifth Circuit. In support of this request, Respondents respectfully show the Court as follows:

JURISDICTION

The Court's jurisdiction of this appeal is based on the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered November 19, 1993. Petitioners' petition for panel rehearing was denied by the Fifth Circuit on January 4, 1994. This Court has jurisdiction to review the judgment of the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION

Petitioners' statement is essentially correct; however, Respondents have not agreed to delay enforcing the ordinance. An agreement to delay enforcement was in effect until the trial court ruled on the constitutionality of the ordinance. After the Fifth Circuit ruled the ordinance constitutional in November of 1993, Petitioners filed a motion to stay the issuance of the mandate and a motion to recall the mandate for the purpose of staying enforcement of the ordinance. Both motions were denied.

Additionally, Petitioners' statement that the City of Dallas on appeal contended that it produced sufficient data to justify the ordinance under the "rational basis" test is incorrect. Respondents have always contended that the data produced was not only sufficient under the "rational basis" test, but also under the "strict scrutiny" test.

B. STATEMENT OF FACTS

On June 12, 1991, in response to citizens' demands for protection of the city's youth, the Dallas City Council enacted a juvenile curfew ordinance. This ordinance prohibits persons under seventeen years of age from remaining in a public place or establishment from 11 p.m. until 6 a.m. on week nights, and from 12 midnight until 6 a.m. on weekends. As defined by the ordinance, a "public place" is any place to which the public or a substantial group of the public has access, and includes streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops. "Establishment" is defined as "any privately-owned place of business operated for a profit to which the public is invited, including but not limited to any place of amusement or entertainment."

Although the ordinance restricts the hours when minors are allowed in public areas, the ordinance also contains a number of exceptions or defenses. A person under the age of seventeen in a public place during curfew hours does not violate the ordinance if he or she is accompanied by a parent or guardian, or is on an errand for a parent or guardian. Likewise, minors would be allowed in public places if they are in a motor vehicle traveling to or from a place of employment, or if they are involved in employment related activities. Affected minors could attend school, religious, or civic organizational functions – or generally exercise their First Amendment speech and associational rights – without violating the ordinance. Further, it is not a violation to engage in interstate travel, or remain on a sidewalk in front of the minor's home, or the home of a next door neighbor.

Additionally, the ordinance places no restrictions on a minor's ability to move about during curfew hours in the case of an emergency. Finally, the ordinance does not apply to persons under seventeen years of age who are married, have been married, or have had the disabilities of minority removed in accordance with Chapter 31 of the Texas Family Code.

A minor violates the curfew if he or she remains in any public place or on the premises of any establishment during curfew hours, and if the minors' activities are not exempted from coverage. If a minor is apparently violating the ordinance, the ordinance requires police officers to ask the age of the apparent offender, and to inquire into the reasons for being in a public place during curfew hours before taking any enforcement action. An officer may issue a citation or arrest the apparent offender only if the officer reasonably believes that the person has violated the ordinance and that no defenses apply. If convicted, an offending party is subject to a fine not to exceed $500 for each separate offense.

Like minors who have violated the offense, a parent of a minor, or an owner, operator or employee of a business establishment is also subject to a fine not to exceed $500 for each separate offense. A parent or guardian of a minor violates the ordinance if he or she knowingly permits, or by insufficient control allows, a minor child to remain in any public place or on the premises of any establishment during curfew hours. An owner, operator or employee of a business establishment commits an offense by knowingly allowing a minor to remain upon the premises of the establishment during curfew hours. An owner, operator or employee of a business is

exempted from the ordinance if that person promptly notifies the police department that a minor is on the premises and refuses to leave.

For ease of reading and to avoid repetition, statistical information regarding juvenile crime is set forth in Section II of this Response.

SUMMARY OF ARGUMENT

The Fifth Circuit's legal analysis regarding the City of Dallas' teen curfew ordinance applies the correct precedent. Petitioners have not met the standard for review which would allow the Court to invoke its discretionary review pursuant to Supreme Court Rule 10.1.

The ordinance in question satisfies the strict scrutiny test and is narrowly tailored to accomplish the stated objectives of the ordinance. Therefore, no denial of equal protection of the law exists.

Petitioners contend that the ordinance infringes upon the right to associate. There is, however, no generalized right of association. This argument, therefore, is without merit.

Petitioners contend that the ordinance violates their right of privacy. This argument is without merit because the ordinance at most is a minimal intrusion into Petitioners' rights. Moreover, this minimal intrusion is significantly outweighed by the compelling state interest advanced.

Petitioners contend that the ordinance is, in effect, a prior restraint. This is incorrect because Petitioners misapply the doctrine of prior restraint. There is no imposition of a restraint prior to publication.

Finally, the City's ordinance is not overly broad, but is narrowly drawn to advance the stated objective. The ordinance, therefore, is constitutional.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. THE STANDARDS FOR REVIEW HAVE NOT BEEN MET BY PETITIONERS.

In vague and conclusory fashion, Petitioners assert that the Court's discretionary review powers are appropriately engaged by the Fifth Circuit's ruling vis-a-vis other courts' decisions, under Supreme Court Rule No. 10.1. *See* Petitioners' Petition, pp. 6-9. Petitioners' contentions are without merit, and the Court should deny discretionary review in the matter.

Supreme Court Rule 10.1 states in relevant part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or . . .

> (c) When a . . . United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. . . .

SUP. CT. R. 10.1(a) and (c). As the Court recently held, the principal purpose for which the Court uses certiorari jurisdiction is to resolve conflicts among the circuit courts of appeal and state courts on the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. ___, 111 S.Ct. 1854, 114 L.Ed.2d 385, 391 (1991). Petitioners' failure to satisfy this standard should necessarily result in the Court's denial of their Petition.

In an attempt to establish that the Fifth Circuit's opinion conflicts with decisions of state courts of last resort, Petitioners cite several state court decisions striking various curfew or similar ordinances as unconstitutional. Petitioners' argument is misplaced. All of the cases cited by Petitioners that struck curfew ordinances did so because the ordinances were not narrowly drawn, but were overly broad. *See* Petition for Writ of Certiorari, pp. 6-8. In fact, the Fifth Circuit, in *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981), struck an ordinance under the overbreadth doctrine because it contained few exempted activities. The Fifth Circuit, however, expressly reserved its opinion to the ordinance presented in that case and did not express an opinion on the validity of a curfew ordinance narrowly drawn to accomplish proper social objectives. *Johnson v. City of Opelousas*, 658 F.2d at 1072. The ordinance under consideration in this case is narrowly drawn and does not suffer from overbreadth. Although the district court held the

City of Dallas' ordinance unconstitutional, " . . . constitutional overbreadth [was] not one of [the ordinance's problems]." *See* District Court Opinion dated August 10, 1992, p. 20, n.36. Had the ordinance at issue not been narrowly drawn, the Fifth Circuit most certainly would have struck it in accordance with the overbreadth doctrine enunciated in *Johnson v. City of Opelousas.*

Since the ordinance was not found to be overbroad by either the district court or the court of appeals, none of the cases cited by Petitioners establishes the requisite conflict necessary to confer the Court's discretionary review under Supreme Court Rule 10.1. Petitioners' cited cases are not relevant to the Fifth Circuit's opinion herein, and the Petition should be denied.

Petitioners also contend that the Fifth Circuit's decision conflicts with other state and federal court decisions sufficient to establish jurisdiction under Rule 10.1. *See* Petitioners' Petition, pp. 9-16. Petitioners' argument, once again, misses the mark. Rule 10.1 specifically calls for review of conflicts "with a state court of last resort"; any attention to lesser state appellate decisions is not sanctioned. Further, Petitioners' attempt to rely upon federal district court cases as creating the necessary conflict does not comply with the provisions of Rule 10. Not a single circuit case is cited by Petitioners. The only federal appellate courts which have reviewed curfew ordinances held them to be constitutional. *See Qutb v. Strauss,* 11 F.3d 488 (5th Cir. 1993); and *Bykofsky v. Borough of Middletown,* 401 F.Supp. 1242 (M.D. Penn. 1975), *aff'd,* 535 F.2d 1245 (3rd Cir. 1976), *cert. denied,* 429 U.S. 964. Since there is no conflict among the various federal circuit courts of appeals,

no basis exists for this Court to exercise discretionary jurisdiction.

Finally, Petitioners argue that this case presents an important question of federal law which should be settled by this Court. Since the federal appellate courts that examined narrowly drawn curfew ordinances, as is the ordinance under consideration, have found them constitutional, no federal law question of such importance is presented. As the Fifth Circuit's opinion aptly demonstrates, narrowly drawn and specific ordinances pass constitutional muster; overbroad ordinances (such as was considered by the Fifth Circuit in *Johnson v. City of Opelousas*) are unconstitutional. For these reasons, Petitioners have failed to establish entitlement to the Court's exercise of discretionary jurisdiction by a writ of certiorari, and have failed to establish the requisite standard for review by this Court. Therefore, the Petition for Writ of Certiorari should be denied.

II. THE CITY OF DALLAS' TEEN CURFEW ORDINANCE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioners contend that the ordinance violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it allegedly makes an impermissible classification between persons under seventeen years of age and those over seventeen years of age. Under the Equal Protection Clause, the Constitution requires that all persons who are similarly situated be treated alike. *City of Cleburne v. Cleburne Living Center,*

Inc., 473 U.S. 432, 439 (1985). If a distinction affects a "suspect class" or infringes upon a fundamental right, the legislation is subject to strict scrutiny. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). A classification based on age is not a suspect category. *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2406 (1991). Petitioners, however, contend that the curfew infringes upon the fundamental right to move about freely in public, and is thus subject to strict scrutiny. An ordinance which sets up a classification can survive strict scrutiny if it promotes a compelling state interest and is narrowly tailored to achieve that interest. *Plyler v. Doe*, 457 U.S. at 216-17. The Fifth Circuit, for the purpose of its analysis assumed, without deciding, that the right to move about freely is a fundamental right. Respondents do not agree that minors have a fundamental right to move about and stroll at all hours of the night. Petitioners would cite *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), for the proposition that minors have a fundamental right to move about, loiter or stroll at anytime during the night. This is incorrect. *Papachristou* stands for the proposition that adults, **not minors,** have a fundamental right to loiter, wander, stroll and move about freely in public.

This Court has recognized that the government has "a strong interest in the welfare of its young citizens, whose immaturity, inexperience and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990). Petitioners conceded that the City of Dallas had a compelling interest in reducing juvenile crimes. The Fifth Circuit, in *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993), held that the City of Dallas had a compelling interest in

reducing juvenile crime and victimization, which would promote juvenile safety and well-being. An ordinance is narrowly tailored if there is a nexus between the state's interest and the classification created by the ordinance. *City of Richmond v. Croson*, 488 U S. 469, 493 (1989).

The Fifth Circuit further held that the City of Dallas provided sufficient statistics to establish that the classification created by the ordinance "fits" the government's compelling interest. *Qutb* at 493. The statistical information relied upon by the court was the following:

1. Juvenile crime increases proportionally with age between ten years old and sixteen years old.
2. In 1989, Dallas recorded 5,160 juvenile arrests, while in 1990 there were 5,425 juvenile arrests. In 1990 there were forty murders, ninety-one sex offenses, 233 robberies, and 230 aggravated assaults committed by juveniles. From January 1991 through April 1991, juveniles were arrested for twenty-one murders, thirty sex offenses, 128 robberies, 107 aggravated assaults, and 1,042 crimes against property.
3. Murders are most likely to occur between 10:00 p.m. and 1:00 a.m. and most likely to occur in apartments and apartment parking lots and streets and highways.
4. Aggravated assaults are most likely to occur between 11:00 p.m. and 1:00 a.m.
5. Rapes are most likely to occur between 1:00 a.m. and 3:00 a.m., and sixteen percent (16%) of rapes occur on public streets and highways.
6. Thirty-one percent (31%) of robberies occur on streets and highways.

Qutb at 493. Also before the Fifth Circuit was the stipulated evidence of the parties that of 494 juvenile arrests during curfew hours from January 1, 1992, to May 31, 1992, 316 of the 494 offenses occurred in public places. The Fifth Circuit, however, did not find it necessary to rely on these statistics, the number of juvenile arrests (offenses) in the City of Dallas in 1991 (6,336), the 2,660 juvenile arrests in the City of Dallas from January 1, 1992, to May 31, 1992 or the anecdotal evidence from police officials in its decision, since the evidence previously set forth was deemed to be sufficient.

The Court of Appeals reached this conclusion in spite of the City's inability to provide precise data regarding the number of juveniles who commit crimes in public places during curfew hours. The statistical information it relied on necessarily established the increase in juvenile crime and that a substantial number of major crimes – murder, robbery, rape and aggravated assault – occur in public places during curfew hours. To have required the City to provide precisely the number of juvenile crimes in public places during curfew hours before a juvenile curfew ordinance could have been enacted would have produced an absurd result. This Court has never required mathematically or scientifically certain criteria prior to the enactment of legislation. *Ginsberg v. New York*, 390 U.S. 629, 642 (1968); *see also Dunnigan v. City of Oxford, Mississippi*, 718 F.2d 738, 748-49 n.8 (5th Cir. 1983).

The Fifth Circuit also found that the ordinance was narrowly tailored to accomplish its goals because it contained a number of defenses or exceptions, and stated that "the defenses are the most important consideration" in concluding that the ordinance used the least restrictive

means of accomplishing its objective. *Qutb* at 493-94. The City's curfew ordinance, because of the exceptions, had a narrow application rather than a broad application. The ordinance went no further than necessary to accomplish its goals, while at the same time respecting the rights of minors. The Fifth Circuit correctly concluded that any imposition on minors' late night activities was indeed slight in light of the City's compelling state interest in protecting juveniles and preventing juvenile crime. *Qutb* at 495. Since the correct legal analysis was applied, this Court should let the Fifth Circuit holding stand and deny the Petition.

III. THE CITY OF DALLAS' TEEN CURFEW ORDINANCE DOES NOT VIOLATE ANY GENERALIZED RIGHT OF SOCIAL ASSOCIATION.

Petitioners contend that the curfew ordinance infringes upon their first amendment right of association. There is, however, no "generalized right of social association." *Stanglin v. City of Dallas*, 490 U.S. 19, 25 (1989). The Fifth Circuit also concluded that if such a right existed, it was adequately protected by the exemptions provided for in the ordinance. The Fifth Circuit further and correctly concluded that any "negligible burden on the individual's right to associate" was outweighed by the compelling government interest. *Qutb* at 495 n.9. The legal analysis by the Fifth Circuit Court was correct, and the Court should not disturb its holding.

IV. THE CITY OF DALLAS' TEEN CURFEW ORDINANCE DOES NOT VIOLATE ANY FUNDAMENTAL RIGHT TO PRIVACY.

Petitioners' parents contended that the curfew ordinance infringed on their fundamental right to privacy because it allowed the state to dictate the manner in which their children would be raised. The Fifth Circuit correctly disposed of this argument in summary fashion and held that the ordinance only presented "a minimal intrusion into the parents' rights." *Qutb* at 495. The Court of Appeals emphasized the broad exemptions contained in the ordinance and the unlimited authority parents retained to make child-rearing decisions in all other aspects of their children's life. *Qutb* at 496. The only aspect of parenting that this ordinance impacts is the parents' right to permit an individual under the age of seventeen years to remain in a public place during the curfew hours without the parent, guardian or other authorized individual. The Fifth Circuit also summarily found that Petitioners' claim under the Texas Constitution was without merit and stated, "We were unable . . . to find any authority that supports the notion that the Texas Constitution would provide more protection in the area of parental privacy." *Qutb* at 496 n.10. The Fifth Circuit applied the correct legal analysis in holding that no privacy right has been violated, and its opinion should not be disturbed.

V. THERE IS NO ISSUE OF PRIOR RESTRAINT IN THIS CASE.

Petitioners contend that the curfew ordinance improperly delegates legislative and judicial power to, and vests untoward discretion in, enforcement authorities

so as to operate as a prior restraint. Petitioners misapply the doctrine of prior restraint, and their argument is without merit.

Prior restraint is the First Amendment doctrine which prohibits the imposition of a restraint on a publication before it is published. *See Near v. Minnesota ex rel. Olson,* 283 U.S. 697 (1931). In this case, the ordinance does not prohibit or place any restraint on any aspect of free speech, and the Court should disregard the prior restraint argument advanced by Petitioners.

Petitioners also contend that the Dallas juvenile curfew ordinance impermissibly shifts the burden of proving the nonexistence of a free speech right and offers such untimely redress for inevitable restrictions of free speech rights in such a way as to operate as a prior restraint. Once again this argument fails because Petitioners have mischaracterized the doctrine of prior restraint. For the reasons previously stated, this argument is without merit and should be disregarded by the Court.

VI. COURTS HAVE CONSISTENTLY UPHELD ORDINANCES THAT ARE NARROWLY TAILORED.

Courts have consistently upheld ordinances that are narrowly drawn to accomplish their stated objectives. Cases which have upheld narrowly drawn teen curfews are: *Qutb v. Strauss,* 11 F.3d 488 (5th Cir. 1993); *Bykofsky v. Borough of Middletown,* 401 F.Supp. 1242 (M.D. Penn. 1975), *cert. denied,* 429 U.S. 964 (1976); *City of Panora v. Simmons,* 445 N.W.2d 363 (Iowa 1989); *People in Interest of J.M.,* 768 P.2d 219 (Colo. 1989); *People v. Walton,* 161 P.2d

498 (Cal. 1945); *Thistlewood v. Ocean City*, 204 A.2d 688 (Md. 1964); *City of Milwaukee v. K.F.*, 426 N.W.2d 329 (Wis. 1988); and *Village of Deerfield v. Greenberg*, 550 N.E.2d 12 (Ill. 1990).

Most of the cases which have overturned curfews, with the exception of *Waters v. Barry*, 711 F.Supp. 1125 (D.D.C. 1989) and *Brown v. Ashton*, 611 A.2d 599 (Md. 1992), have done so pursuant to an overbreadth analysis because of the paucity of exempted or excepted activities. Cases which have overturned juvenile curfews for overbreadth are: *Alves v. Justice Ct. of Chico Judicial Dist.*, 306 P.2d 601 (Ct. App. Cal. 1957) (used an overbreadth analysis to determine that curfew ordinance unlawfully invaded personal rights and liberty); and *Allen v. City of Bordentown*, 524 A.2d 478 (Super. Ct. N.J. 1987) (curfew ordinance struck for vagueness and overbreadth and as violative of equal protection and fundamental right to move about, no compelling governmental interest at stake; exceptions only for emergencies and legitimate business); *City of Maquoketa v. Russell*, 484 N.W.2d 179 (Iowa 1992) (striking ordinance as overbroad); *City of Wadsworth v. Owens*, 536 N.E.2d 67 (Wadsworth Mun. Ct. Ohio 1987) (striking presence ordinance as violative of right to attend religious services and right to move freely); *Hayes v. Mun. Court of Oklahoma City*, 487 P.2d 974 (Ct. Crim. App. Okla. 1971) (curfew ordinance struck under due process clause of Fourteenth Amendment for overbreadth and vagueness); *In re Doe*, 513 P.2d 1385 (Ha. 1973) (curfew ordinance struck because vague and overbroad under Fourteenth and Fifth Amendments); *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981) (striking

an ordinance with few exempted activities under overbreadth doctrine although the court stated that it did not express any opinion on the validity of a curfew ordinance narrowly drawn to accomplish proper social objectives); *K.L.J. v. State*, 581 So.2d 920 (Fla. App. [1st Dist.] 1991) (curfew ordinance struck for overbreadth because not narrowly drawn and fails to apprise persons of prohibited conduct); and *McCollester v. City of Keene*, 586 F.Supp. 1381 (D.N.H. 1984) (curfew ordinance struck for overbreadth in violation of due process clause of Fourteenth Amendment); *W.J.W. v. State*, 356 So.2d 48 (Fla. App. [1st Dist.] 1978) (curfew ordinance which did not provide for emergency exception and therefore invades personal rights and liberties); and *City of Seattle v. Pullman*, 514 P.2d 1059 (Wash. 1973) (ordinance struck for being overly broad). Therefore, since courts have consistently upheld narrowly tailored curfew ordinances as the one in question, this Court should refuse to consider this case.

CONCLUSION

None of the issues Petitioners present is of such precedential value that warrants review by this Court. Additionally, there is no conflict among the circuits or among the circuits and state courts of last resort regarding any of the issues presented. Further, this case does not present an issue of federal law that needs to be settled by this Court. The Fifth Circuit meticulously reviewed the facts and applied the correct legal standards in reaching

its conclusions. For the reasons stated herein, this Court should deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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